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Supreme Court, U.S.
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No. 06-834

In the
**Supreme Court of the United States**

F.J.S.

*Petitioner*

v.

Commonwealth of Pennsylvania, Erie, PA;
District Attorney Marshall Picininni, Esq, Erie, PA;
District Court of Western Pennsylvania (Erie);

*Respondents*

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On Petition for Writ of Certiorari
To: US Court of Appeals Third Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## Questions Presented for Review

1. Should District Courts grant a petitioner an evidentiary hearing when a petitioner claims that State Officials have committed fraud in that District Court by willfully and maliciously falsifying key material evidence to the District Court; which would wrongfully affect all subsequent appeals and protect state officials from any wrong doing?
2. On appeal from the District Court, does the United State Court of Appeals for the Third Circuit have a duty to address the claims of State fraud in an evidentiary hearing and/or have a duty to determine that the material evidence supplied to the District Court was factual when a US Citizen presents such claims before the court?
3. After all appeals arguing fraudulent records by state officials does the United State Court of Appeals for the Third Circuit have the right to say that a petitioner would be better served by an appeals court from actions happening in a District Court in a Writ of Mandamus when new evidence documented by an licensed attorney proving the State fraud has been presented and all appeals rights had been exhausted?
4. Can there be a speedy and fair trail or appeal anywhere in the Commonwealth of Pennsylvania (including the federal

courts within) without seeking justice in the United States Supreme Court when Commonwealth officials have: an unlimited amount of money to prosecute; can manipulate witnesses, hide favorable evidence repeatedly, commit fraud in our federal courts; and then use absolute immunity as defense when they violate a U.S. citizen's constitutional rights?

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## IN THE
## SUPREME COURT OF THE UNITED STATES
## PETITION FO WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals appears at **(Main Appendix A, pages 25-32)** to the petition and is unpublished.

## JURISDICTION

The date on which the United State Court of Appeals decided my case was May 31, 2006.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 19, 2006, and a copy of the order denying rehearing appears in **(Main Appendix A, pages 25-32)**.

The jurisdiction of this Court is invoked under 28 U.S. C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Bill of Rights, Article VI and Article XIV, Section1……Page 12**

**Title 23 Chapter 6300…… Page 10, 11**

**Title 55 Chapter 3490…… Page 10, 11**

**18 Pa. C.S.A. § 3126 …… Page 12**

**PA Title 18 Section 4902….. Page 16**

## STATEMENT OF THE CASE

This innocent petitioner was convicted of misdemeanors as a result of fraud within Erie County, Erie Pennsylvania Court System. This petitioner discovered material evidence after the fact, of witness/**perjury (1)** and **fraud** (2) by the Commonwealth which, if properly addressed when charged and during trial would have lead to impeachment of the state's key witness (the alleged victim) not conviction of this petitioner.

(1)The perjury begins when the State's key witness testifies under oath **(see pages 132-134)** that she never talked to anyone at Rape Crisis Center and they never asked me about – if I was ever sexually abused. As can be seen the alleged victim then wrongfully transposed the Millcreek Police Report 87-565-10 **(see pages 147-150)** to charge the petitioner.

(2) The fraud of the Commonwealth is now documented in District Court of Western PA (Erie) and is shown in the 1999 Magistrate Judge's Report and Recommendation when the Commonwealth reports that the perjury evidence was suppressed in an evidentiary hearing at trail court when it was not. **(See the Magistrates Judge's Report and Recommendations: APPENDIX SUB (A) PAGE 131) where Judge Baxter states:**

> **"Again, the perjured testimony to which the Petitioner refers is the testimony regarding the incident and subsequent counseling in March 1987.**
>
> **The evidence was excluded after an evidentiary determination made by the**

**trail court. This Court need not examine the evidentiary hearing by the state trial court."**

See also the Court's Footnote 10 on page 131 states:

"The Commonwealth has failed to provide this Court with the documents relating to this evidentiary hearing".

**The Commonwealth's fraud is now proven by Attorney Hathaway's letter dated June 22, 2005. (See pages 144-146).**

The fraud is repeatedly confirmed. The petitioner's main argument was the Brady claim and again **Judge Baxter wrongfully affirms the Commonwealth's fraud without documentation:** that the material evidence (the Millcreek Police Report 87-565-10)**(See pages 147-150)** was excluded at trail by way of an evidentiary ruling by the trial court. **(See the Magistrate Judge's Report and Recommendation Appendix Sub (A), page 139)** where Judge Baxter states:

**"However, the suppression of evidence to which the Brady court refers in the nondisclosure of exculpatory evidence to defense counsel, not, as is the case here, the exclusion of evidence at trial by way of an evidentiary ruling by the trial court."**

This petitioner repeatedly told the court that the evidence was fraudulently suppressed, that is was highly favorable to him, and that it was material to guilt or punishment. But the evidence in the Millcreek Police Report 87-565-10 which the Magistrate Judge Baxter refers is again used fraudulently: **(See Magistrate Judge's Report and Recommendation Appendix Sub (A) pages 136-137)**:

> **"In the present case, Petitioner Sontag cannot demonstrate with a reasonable likelihood that this evidence (of whether the complaining victim was the victim of a prior sexual assault and was subsequently counseled by the Rape Crisis Center) was material to the criminal charges he faced. Petitioner has not shown that with the introduction of this evidence his jury trial would have resulted in an acquittal. <u>Based on the suppression of this evidence (by evidentiary ruling by the trail court),</u> Petitioner pled no contest thereby accepting the Commonwealth's case against him."**

Here Judge Baxter fails to understand and fails to see that perjury would have been material evidence in an indecent assault since there was a denied indecent assault that occurred at the same time that charges were filed against this petitioner and that there was a sexual counselor that could have offered expert testimony about the alleged victim's untruthfulness and could have shown the

connection of why a hidden indecent assault was denied under oath and why similar charges were then told about this petitioner later in life; and if Mrs. Peterson, **(See page 151)** the sexual counselor at the time, had been made able to defense, she could have testified why the alleged victim transferred a denied indecent assault to the petitioner and how the alleged victim was manipulated by the Commonwealth, other state agencies s and how the attempted murder of this petitioner was probably caused by the lies of K's mother, and her friends; all of which would have been very material to the truthfulness of the state's witness and the motive for the Commonwealth involvement. Untruthfulness is the only defense in cases like these and this untruthfulness was willfully and maliciously hidden by the Commonwealth.

To prove fraud on the Commonwealth and show that it was not just a honest mistake this petitioner filed repeated motions of the fraud in the District Court concerning the Commonwealth's actions. Asking and literally begging Judge Baxter again and again to address this fraud, and each time nothing was done. Judge Baxter's denials consequently affected all future appeals. Petitioner repeatedly showed the courts and the Commonwealth that the Petitioner had the fraud evidence; yet all courts denied any hearing concerning and the Commonwealth willfully and maliciously refused to correct the fraud. **(See one such repeated filing in Main Appendix D, page 157)**. Petitioner States in his number (3) heading to the district court.:

**"3. In the Magistrates Judge's Report and Recommendations dated**

**August 19th, 1999 on page 2, line16-18 it states:**

> **'As a result of the motion in Limine evidence of an alleged sexual assault of against the child victim by a group of young boys (and subsequent rape counseling) was excluded.'**

**This is an obvious lie to the court about what was suppressed here. The evidence in question: the Millcreek Police Report of the alleged sexual assault was not suppressed in a motion of limine or any evidentiary hearing in any trial court, this must be corrected."**

Again Judge Baxter did nothing and the Commonwealth willfully and maliciously refuses to correct their fraud.

After six years with all appeals exhausted and no hearings into the matter this petitioner contacted the FBI with this evidence. The FBI reviewed the evidence and explained that the Commonwealth and the Federal Court Records say that the evidence was suppressed in a Motion of Limine at trial court. **You need to get an attorney to affirm and collaborate that the Commonwealth indeed committed fraud and then let the courts handle it.** Attorney Hathaway was retained in 2005 to research the matter for possible affirmation of the fraud: whereby Hathaway affirms and collaborates the fraud as can be seen at: **(See Appendix Sub B, pages 144-146):**

> **"You retained me for…….. The Motion in Limine was in regard to the Commonwealth's**

**effort to exclude certain evidence of an alleged sexual assault against the child victim by a group of young boys and the subsequent rape counseling engaged in by the child victim. Magistrate Judge Susan Paradise Baxter referenced said Motion in Limine....I now write for the purpose of advising you that I did not find any evidence within the case file of the Motion of Limine at issue or any court order granting said motion... there is no ostensible reference to the other allegations regarding the rape of the child victim by the group of boys and her counseling arising from that incident.....Therefore, in regard to your directive to me, I can state my findings that I did not locate any evidence of record as to the Motion of Limine referenced by Judge Baxter."**

All previous claims of fraud was presented with Attorney Hathaway's Letter confirming the Commonwealth's fraud to the Third Circuit in a Writ of Mandamus **(See Main Appendix (C), pages 67-154)** which is not heard. The judgments and opinions of the U.S. Court of Appeals Third Circuit were unclear even after talking with four attorneys in Erie, PA. And despite the innocence of this Petitioner the claims of fraud by the Commonwealth are ignored. One evidentiary hearing concerning the claim of Commonwealth

fraud could have saved thousands of dollars in Court costs and saved this petitioner six years of his life and if this RAILROAD had been discovered in 1996, this petitioner could have saved 10 years of fighting for his life. This fight started in 1996 and can be seen in the petitioner's no contest plea agreement, whereas, this petitioner knew of the fraud but couldn't get his hands on the illegally suppressed evidence of the Commonwealth. (See petitioner's comment): **(Magistrate Judge's Report and Recommendations Appendix Sub A, page 113 (DA's plea agreement questions)**

> **"MR. PICCININI: Are you being forced or coerced in any fashion to enter this plea other than your acceptance of the strength -- THE DEFENDANT: Other than the system?"**

**Additional details and clarity of the Commonwealth's fraud and perjury follow**: In 1994 the Commonwealth of Pennsylvania investigated and conspired to falsify an assault and other related misdemeanors against this petitioner. The alleged victim was the petitioner's step daughter (which I will call K in this petition), and unfortunately was also related to Erie, Pennsylvania's ex Mayor, Mr. Lou Tullio. (Erie, PA was the original jurisdiction in this case). It is shown by the fraud of the Commonwealth that the **Commonwealth without doubt concealed evidence before and after the preliminary hearing in 1995 whereby the State's key witness (K) did commit impeachment/perjury**

**statements when she denied any knowledge of a now documented indecent assault and sexual counseling with four boys in the woods in 1987 and transferred the Millcreek Police Report 87-565-10 of an indecent assault to this petitioner.** (See **Appendix Sub (C) pages 144-147**) She testified that in 1987 that she had no knowledge of meetings at the Rape Crisis Center, that K went to, and didn't talk to any sexual counselor at that time about any sexual activities of any kind. (**See Testimony in Magistrates Judge's Report and Recommendations APPENDIX SUB (A) PAGES 132-134**) The Commonwealth knew the key witness had committed perjury and used the hidden indecent assault in this same time period against this petitioner. The Commonwealth knowingly had this impeachment/perjury evidence because the Commonwealth had the Millcreek Police Report 87-565-10 (**See pages 67-89**) and the other agency documents (Ref. Pennsylvania Statutes **Title 23 Chapter 6300 and Title 55 Chapter 3490 - public record unattached**); the documents showing that sexual counseling by Mrs. Peterson had indeed occurred during this time period (**See pages 151-154**) and the Commonwealth knew was this petitioner's only defense against the made up charges.

The Commonwealth proceeded with the charges against this petitioner whereby the Commonwealth knew by the mandated statutes (Ref. **to Pennsylvania Statutes Title 23 Chapter 6300 and Title 55 Chapter 3490**) that requires reporting of ongoing investigations by CYS (Office of Children and Youth Service in Erie) and the Rape Crisis Center to the DA's

Office. Thus, they all knew that State's key witness had committed perjury by K's denying under oath that she never talked to anyone about sexual activities at that time and denied any sexual counseling in 1987 and stated: that she only had knowledge of sexual activity with this petitioner at that time. To prove the charges against the petitioner occurred in the same time as the Millcreek Police Report #87-565-10 (**See Appendix Sub (C) pages 147-150**)) which shows the Millcreek police report was filed in March of 1987; petitioner documents **(Main Appendix E and F, pages 165-185)** that the Commonwealth shows indecent assault charges against this petitioner from June of 1986 and thus very relevant for any defense for this petitioner.

Since K claimed that the Millcreek Police Report and sexual counseling never happened this evidence would have been critical for the defense. The evidence of a sexual counselor could have shown how the complainant had committed perjury/impeachment and could have provided the reasons for the **transfer of the documented Millcreek Police Report to the petitioner**. But the Commonwealth did have/withheld this impeachment/ perjury evidence willfully, maliciously, and in a conspiracy with other state agencies (See mandate actions in Pennsylvania Statutes **Title 23 Chapter 6300 and Title 55 Chapter 3490**) (detailing the mandated interaction between State prosecution and State Agencies in these cases)). The Commonwealth kept hiding this material evidence repeatedly from the courts and committed fraud in the District Court as proved in the letter from Attorney Hathaway

**(See Appendix Sub B Pages 144-146)**. Which basically states: " Therefore, in regard to your directive to me, I can state my findings that I did not locate any evidence of record as to the Motion of Limine referenced by Judge Baxter" **(See Judge Baxter ref. comments page 131).** Attorney Hathaway's letter also proves the crime of fraud by the Commonwealth of Pennsylvania. (See **Howell v. Kraft**, 10 Washington. App 266,517 P.2d 203 (1973) **satisfying all 9 elements**. **(See page 86,87)**

This now documented malicious prosecution by way of the Commonwealth fraud denied this petitioner federal rights under the **Bill of Rights, Article VI and Article XIV, Section1 – public record unattached.** This material evidence was the only defense for the petitioner because in the Commonwealth of Pennsylvania a victim's testimony alone is enough for conviction in cases like this and untruthfulness is grounds for impeachment proceedings and reversible error. (See **18 Pa. C.S.A. § 3126, and all notes**).

I repeatedly told my trial attorney Mr. Ridge Esq. that my step daughter was lying about the indecent assault and other related misdemeanors; and was using an previous indecent assault to keep me from getting custody of my son, J which I hadn't seen in 10 years. Upon asking, the trial court ruled all material was turned over **(See Appendix E and F page 177, docket date 8/08/95).** The Commonwealth's conspiracy would affect all future State and Federal appeals. Moreover, the Commonwealth, as shown, would use any U.S. Court to conceal their wrong doings. Thus, since there was no record of another indecent

assault in 1987 until the Millcreek Police Report was found; and there was no sexual counselor for evidence to prove the untruthfulness of K, my attorney could not really believe my claims and petitioner had no defense because of fraud by the Commonwealth. I did ask Mr. Ridge to question K at the preliminary hearing about a parallel indecent assault but the DA willfully interrupted my attorney's questioning when close to exposing the concealment of the Millcreek Police Report; whereby the DA, Mr. Piccinini, requested a side bar at the preliminary hearing which affected further discovery of the material evidence hidden by the Commonwealth. On the morning of trial my attorney must have believed I had been lying about the other indecent assault and suggests a no contest plea instead of 35 years in the state prison system if we lose. And then I just about have a heart attack when he told me that morning that her testimony was enough to convict me, he cited **18 Pa C.S.A. § 3126 Note 21. (her testimony is enough to convict)** He also stated that a no contest plea would get me county time, no State time, and there was a good chance of work release. **(See Main Appendix G page 186-192, showing affidavits supporting my claim)**. As a Vietnam Veteran, I could not believe this was the America justice system but for the illegal coercion I was between the rock and a hard place so I had to take the no contest plea knowing that I would find the material evidence that the Commonwealth was hiding. It took me two years fighting rape shield laws but in 1998 the petitioner got the smoking gun via a Civil

Subpoena (the Millcreek Police Report 87-565-10) that would show all the ties of the material evidence for impeachment/perjury, which was indeed hidden by the Commonwealth. It was immediately presented to the District Court of Western Pa Erie in a Petition for Writ of Habeas Corpus. **But not only did the Commonwealth hide the evidence at trial court it is now proven that during the Petition for Writ of Habeas Corpus the Commonwealth committed fraud in 1999 by fraudulently falsifying the District Court Records in Erie by reporting that the material evidence (the Millcreek Police Report 87-565-10) a reported indecent assault with 4 boys with a knife had been legally dismissed at trial court which the Commonwealth collectively knew was not true and refused to correct such.**

As seen, the Commonwealth told the District Court that the material evidence was legally suppressed at the trial court and the District Court of Western PA Erie refused to grant any hearing into the matter even when this petitioner repeatedly claimed they were lying and falsifying the records: via repeated motions and reconsiderations. (Not a mistake by any reasonable mind, fraud at this point). Again proof of one such filing can be seen in **(Main Appendix (D) pages 155-164).** This petitioner knew of the fraud of the Commonwealth and no one would listen). This petitioner did everything humanly possible to get this fraud point across to the court. And the Commonwealth just sat back and smiled at the petitioner filings of their fraud which they now thought would forever be concealed. Thus again

and again, the District Court of Western PA Erie and the Commonwealth was repeatedly given this material evidence and the court denied all requests by the petitioner for the Commonwealth to document their obvious fraudulent statements which then became a fraudulent federal court record to be relied on in all future appeals against this petitioner, this kind of justice is totally appalling. Thus, with just one evidentiary hearing concerning the Millcreek Police Report, material evidence could have been discovered; evidence from the Rape Crisis Center; and perjury of the alleged victim could have been addressed. The petitioner found material evidence on his own by documenting: that sexual counseling by Mrs. Peterson at the Rape Crisis Center indeed occurred as referenced in the Millcreek Police Report. **(See Appendix Sub (D), pages 151-154).** With a parallel indecent assault going on, the manipulation and perjury could have been shown with the documents of the Millcreek Police Report 87-565-10 and the sexual counselor could have offered expert testimony about my step daughter's truthfulness and unfounded sexual story telling; and Mrs. Peterson could have explained the reasons why a similar indecent assault was transferred to this petitioner and why it was used.

Despite repeated filings of the Commonwealth's fraud, malfeasance, and the falsifying of court records: the District Court repeatedly refused my claims for an evidentiary hearing as did the US Court of Appeals Third Circuit for they rightfully believed the Commonwealth would never commit fraud in a

Federal Court of Law and maybe rightly so because this petitioner couldn't believe it.

The Magistrate Judge Susan Paradise Baxter predetermines (**See Magistrate Judge's Report and Recommendation Appendix Sub (A) pages 136-137**) that this petitioner cannot demonstrate with a reasonable likeliness that this evidence was material to the criminal charges he faced. But this petitioner had motioned the court repeatedly that the Commonwealth was committing fraud and protecting perjury of the ex-mayor's relative in their court. PA perjury defined: under the statute of perjury in Pennsylvania **PA Title 18 Section 4902;** the perjury of K and of the Commonwealth is now committed by law where: "(a) the offense defined. - ...makes a false statement under oath or equivalent affirmation...(b) Materiality. – Falsification is material... (c) It is not a defense to prosecute under this section that the oath or affirmation was administrated or taken in an irregular manner..."

Untruthfulness is the only defense when one person's testimony is enough for conviction in PA and the willful Commonwealth fraud prohibited any showing of untruthfulness.

All the concealed evidence of the Commonwealth denied all arguments of prosecutorial misconduct and denied related potential defense strategies which would effectively result in ineffective assistance of counsel. No matter what combination of prosecutorial misconduct or ineffectiveness, with this evidence the petitioner could have went to trial; and this evidence would have shown my innocence and provided impeachable

evidence against the complainant. (See **Tate v, Wood**, 963 F.2d 20 (2d Cir. 1992).

It can be further argued that the Commonwealth fraud caused ineffective assistance of counsel resulting in counsel deficiencies and did prejudiced the defense. (See **Strickland v. Washington**, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2064-74, 80 L.Ed.2d 674 (1984). No person should ever experience such a miscarriage of justice especially when the Magistrate Judge Baxter backs up her ill argument of a no **Brady** claim using the fraudulent claims of the Commonwealth and repeatedly ignores the petitioner's repeated claims of State fraud; this is appalling.

The letter by Attorney Hathaway **(Appendix Sub B pages 144-146)** proves beyond reasonable doubt that the evidence was never suppressed by an evidentiary ruling at trial court but was indeed hidden by the Commonwealth and then the Commonwealth did willfully falsified Federal Court records to hide their unlawful railroad of this petitioner. All subsequent appeals through the lower courts relied upon this fraud of the Commonwealth and the courts dismissed every motion without evidentiary hearings.

The evidence was material because of the falsification because the State's key witness told the court at a preliminary hearing under oath that the petitioner had committed the crimes and K had no other sexual meetings or sexual counseling for any related sexual activity; all of which was relevant for the defense. The attached documents indeed show that the Commonwealth of Pennsylvania had the

smoking guns for untruthfulness all along and conspired to defraud the Federal District Court and hide all criminal activity of the Commonwealth. Again very relevant because the petitioner could have shown that the witness had cloned the Millcreek Police Report 87-565-10 and why it was used it to charge this petitioner instead.

This petitioner has the proof of the State - fraud in District Court of Western Pennsylvania Erie and it is the main issue of the certiorari but this fraudulent activity has propagated through all the State Appeals Courts as well. And because of all the fraud of the Commonwealth this petitioner was even hesitate to file at the trial court level for fear of more eerie fraud. This fear and lack of legal knowledge as a pro se litigate consequently caused the petitioner to file the Millcreek Police Report past a trial court time limit. But I finally filed, and Judge Ernest DiSantis, Jr. denied relief even for the ends of justice.

The petitioner's father then said he would pay for an attorney to appeal this evidence rather than go pro se again. We hired Attorney Hathaway. On appeal **(See Main Appendix (B) pages 40-41 the footnote) it** shows the PA Superior Court lacked independent corroboration of Appellant's claims and thus affirmed Judge DiSantis ruling. As shown in **(See Main Appendix (B) pages 43-65)** strong arguments were made to withdrawn the no contest plea but the Superior Court of Pa affirmed Judge DiSantis' ruling again without hearing. Besides the Millcreek Police Report, an evidentiary hearing should have been granted for other reasons as well because the

petitioner's Attorney Mr. Hathaway Esq. claimed that the petitioner relied upon specific representation proffered by defense counsel in deciding to enter the no contest plea **(See Main Appendix B, pages 51-52).** The petitioner has attached three affidavits which were later submitted to the United States Court of Appeals for the Third Circuit as proof to existence. **(See Main Appendix G pages 186-192).** Further, (citing **Ostrander v. Green**, 46 F.3d 17 (4th Cir, 1995) an induced no contest plea constituted ineffective assistance of counsel... proving that trail counsel (Mr. Dave Ridge) had promised no state time with a credible potential for work release for the no contest plea.

With the fraud of State and the bad advice of my trial attorney nothing seemed fair in the system. Surely an evidentiary hearing to discover underlying Commonwealth fraud, perjury and ineffective assistance of counsel is required in some court of law in America?

It is apparent that the courts want all the evidence before an evidentiary hearing is granted, but when the Commonwealth continues to hide it fraudulently - that is not possible. Surely a U.S. Citizen has a right to an evidentiary hearing to discover exculpatory evidence when they claim that the evidence is being illegally concealed by a State?

**If the Commonwealth continues to claim innocence then why did they willfully and maliciously falsify Federal Court Records to protect themselves and then willfully and maliciously not correct it?**

A misunderstanding of the record as implied by the Third Circuit opinion **(See**

**Appendix A, page 29)** is yet another side step, affected by the trickery of the Commonwealth. The Commonwealth was fully made aware of this fraud repeatedly and willfully did nothing but leave it hidden with Judge Baxter's ruling. **The fraud in the District Court of Western Pa, Erie now proves that the Commonwealth's concealment is endless and dictatorial.**

With all appeals exhausted in 2006, the petitioner went to the FBI in Erie PA, they told me: "Should we believe you or the Commonwealth of Pennsylvania: the State says the Millcreek Police Report was legally suppressed at trial court so unless you get an Attorney to confirm the contrary and prove the fraud there is nothing we can do and even if you confirm this fraud the courts should handle it." The petitioner then did contracted Mr. Hathaway, Esq. again which now confirms the Commonwealth's fraud and presented the new collaboration evidence in a Writ of Mandamus to the US Court of Appeals Third Circuit since the fraud obviously occurred in the District Court of Western Pa Erie. The US Court of Appeals Third Circuit stated in their opinion that the petitioner would be better served by an appeals court when they obviously knew or should have known that this new evidence cannot be brought up in an appeals court again to the best of this petitioner's knowledge; and even if this petitioner could appeal as far as this pro se litigate understands: they were the appeals court for the District Court of Western Pennsylvania Erie in question. This petitioner tried to get an attorney to understand the US Court of Appeals ruling but they all referred me to the Federal Court Master of Erie, Mr.

Paul Susko who was too busy to read the opinion unless I had $10,000. It seems that nothing is fair about the Commonwealth's justice system when the Commonwealth has an unlimited amount of money to prosecute you, when they can falsify court records, enjoy absolute immunity and can hid material evidence to railroad anyone in the Commonwealth. Thus, it is extremely important for this court to look into the practices of the Commonwealth and correct these injustices.

It is a prosecutorial duty to disclose material exculpatory evidence which reflects the notion that prosecutors represent the public, which wins not only when the guilty are convicted but when criminal trials are fair. **Brady v. Maryland**, 373 U.S. 83, 87, (1963). When evidence is wrongfully suppressed, the prosecutor violates his duty to the public and also interferes with defense counsel's ability to serve as an effective advocate.

In this case not only did the State conceal the evidence for years; the Commonwealth falsified Federal Court records to fraudulently conceal the evidence. This conspiracy of fraud has: affected all future arguments of impeachment of the Commonwealth's key witness; hides Commonwealth fraud activity; destroys material evidence; and suppresses the perjury in any court of law. See **Stricker v. Greene**, 527 U.S. 263, 283 (1999) (facts that documents were suppressed and trial counsel relied on prosecution's open-file policy were "fairly characterized as conduct attributable to the Commonwealth that impeded trial counsel's access to the factual basis for making a Brady

claim"). This should be sufficient to establish the existence of cause for whatever procedural default many have occurred at the state level. **Murray V. Carrier**, 477 U.S. 478, 488 (1986) (a showing that interference by public officials impeded counsel's efforts to comply with state procedural rule constitutes cause); **Scott v. Mullin**, 303 F.3d 1222, 1229 (10th Cir. 2002) (It is not a petitioner's responsibility to uncover suppressed evidence.")

When the District Court of Western Pa Erie denied this petitioner any evidentiary hearing it effectively rewarded the Commonwealth's fraud and insulated this petitioner from meaningful review in any court of law. See **Smith v. Zant**, 301 S.E. 2d 32,37 (Ga. 1983)("Since the prosecution has the constitution duty to reveal at trial that false testimony has been given by its witness, it cannot, by failing in this duty, shift the burden to discover the misrepresentation after trial to the defense."). The ruling sets a dangerous precedent by providing the prosecution with an incentive to conceal Brady material for as long as possible. Moreover, as this case demonstrates, the Commonwealth commits fraud in a District Court of law to hide Brady material. This Honorable Court should now establish some protection for this petitioner and protection for future U.S. Citizens in this country. Such an appalling abandonment of constitutional law by the States against its citizens should be corrected by this Honorable Court before such precedents become common law and undermine all social justice in America.

## REASONS FOR GRANTING PETITION

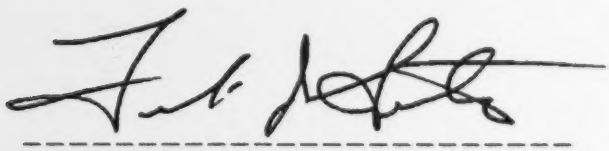
This case is nationally important and the United States Supreme Court should grant this Writ of Certiorari because the decisions of the lower courts in this case are in conflict with all other decisions of other appellate courts and this Honorable Court. It is important not only to this petitioner but all US Citizens in similar situations. Because of all the Commonwealth fraud this petitioner believes that this Honorable Court has a duty to all American Citizens to grant this Writ of Certiorari. It is appalling that any Federal Court would automatically assume that a Commonwealth would never commit fraud in their court and further assume that pro se litigates are simply mistaken; despite repeated claims of hidden Commonwealth fraud . This is not what America is all about and this Honorable Court should fix this miscarriage of justice and the fraudulent State/Commonwealth activities that are currently occurring in the legal justice system today. A ruling is necessary with enough punishment to force the States/Commonwealths to refine from such activities against ~~any U.~~ S. Citizen in the future. The stability of the justice system for the American people is at stake and such fraudulent State/Commonwealth activities cannot be tolerated in any justice system.

## CONCLUSION

The US Supreme Court should do everything in its power to establish a precedent whereby States committing fraud in any Court of law will not be tolerated. Do everything in your power to have judges at the very least address seriously claims of State/Commonwealth fraud. Remove the nobility title (absolute immunity) for state officials that violate any Citizen's Constitutional Rights by fraud to help curtail this type of activity from happening again. Order the appropriate lower courts to correct the fraudulent records involved in this case, grant my innocence, and have a lower court indict all State officials and agencies involved. Establish that a Writ of Mandamus may be a correct remedy after 10 years in the appeals courts when government fraud has been involved.

The petition for a writ of certiorari should be granted.

Respectfully,



Date: November 19, 2006

# MAIN APPENDIX (A)

DPS-159

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-5448

IN RE: FRANK SONTAG,
Petitioner

On a Petition for Writ of Mandamus from the United States District Court for the Western District of Pennsylvania
(Related to W.D. Pa. No. 97-cv-00349)

Submitted Under Rule 2 1, Fed, R. App. Pro.
March 23, 2006

Before: ROTH, FUENTES AND VANANTWERPEN, Circuit Judges.

**JUDGMENT**

This cause came on to be heard on a petition for writ of mandamus. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the petition for writ of mandamus be, and the same is, denied.

All of the above in accordance with the Opinion of the Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk
DATED: May 31, 2006

DPS-159 **NOT PRECEDENTIAL**

**UNITED** STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 05-5448

IN RE: FRANK SONTAG
Petitioner

On a Petition for Writ of Mandamus from the United States District Court for the Western District of Pennsylvania
(Related to W.D. Pa. No. 97-cv-00349)

Submitted Under Rule 2 1, Fed. R. ApI2. Pro.
March 23, 2006
Before: ROTH, FUENTES AND VANANTWERPEN, Circuit Judges.
(Filed: May 31, 2006)

OPINION

PER CURIAM

Frank Sontag pleaded no contest to state charges arising from the sexual assault of his stepdaughter. The United States District Court for the Western District of Pennsylvania denied his habeas corpus petition, and we declined to issue a certificate of appealability. Sontag has filed a petition for a writ of mandamus pursuant to 28 U.S.C. § 1651 asking us to order the District Court to "address the state and local frauds" "correct all the court records," and "determine the real parties of interest in this fraud scheme." Sontag also asks that we

issue "indictments[] to resolve these issues," "make sure that any State which refuses to uphold the United States Constitution faces the wrath of the Federal Courts," and "set up procedures that will prevent this heinous activity from happening in the future." Petition at 19.

Mandamus is a "drastic remedy" which is generally used to "'confine an inferior court to a lawful exercise of its- prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."' Kerr v. U.S. Dist. Court, 426 U.S. 394, 402 (1976) (citations omitted). Only "'exceptional circumstances amounting to a judicial "usurpation of power""' warrant the use of this extraordinary remedy.- Id. (citation omitted).

Even if the relief sought were within this Court's authority, a petition for a writ of mandamus is not the proper vehicle for Sontag's claims. Most of them were previously raised in his appeal of the District Court's denial of his habeas petition. The fact that Sontag was unsuccessful in that appeal is not grounds for pursuing mandamus relief. In his single new argument, Sontag contends that the District Court based its denial of his claims on a misunderstanding of the state court record with regard to certain testimony given by the victim at the preliminary hearing. He alleges that this misunderstanding is due to fraud on the part of the government. However, these arguments are more properly brought in an appeal or a motion for reconsideration. A mandamus petition is not a substitute for an

appeal; if a petitioner can obtain relief by an ordinary appeal, a court will not issue the writ., See In Re Ford Motor Co., 110 F.3d 954, 957 (3d Cir. 1997).

Accordingly, we will deny the petition.

DPS-159

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5448

IN RE: FRANK SONTAG,

Petitioner

On a Petition for Writ of Mandamus from the United States District Court for the Western District of Pennsylvania
(Related to W.D. Pa. No. 97-cv-00349)

Submitted Under Rule 21, Fed. R. App. Pro.
March 23, 2006

**SUR PETITION FOR REHEARING EN BANC**

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES and ROTH% Circuit Judges

*Judge Roth's vote is limited to panel rehearing only.

The Petition for Rehearing filed by the Petitioner in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: July 19, 2006

# MAIN APPENDIX (B)

**Superior Court of Pennsylvania**
**Pittsburgh District**

Commonwealth Of Pennsylvania
Appellee

Vs NO.112 WDA 1999

Frank 3. Sontag
Appellant

JUDGMENT

UPON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Erie County be, and the same is hereby affirmed.

BY THE COURT:

s/ Eleaner R. Valecko
DEPUTY PROTHONOTARY

DATE: December 15, 1999

J. S88016/99

COMMONWEALTH OF PENNSYLVANIA,
Appellee
V.

FRANK J. SONTAG
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 112 WDA 1999

Appeal from the Order entered on December 28, 1998 in the Court of Common Pleas,
Erie County, Criminal, No. 1339 of 1995

BEFORE: KELLY, SCHILLER and OLSZEWSKI, JJ.

MEMORANDUM: FILED: DECEMBER 15, 1999

Appellant, Frank J. Sontag, appeals from the order entered December 28, 1998, in the Court of Common Pleas of Erie County, denying him post conviction collateral relief. We affirm.

FACTS:

On February 8, 1996, Appellant pleaded *nolo contendere* to two counts of indecent assault[1], one count of terroristic threats[2] two counts of corruption of minors [3], and one count of endangering welfare of children[4].
Appellant's convictions arose from his ongoing molestation of his

[1] 18 Pa.C.S. § 3126 (a)(6).

[2] 18 Pa.C.S. § 2706.

[3] 18 Pa.-C.S. § 6301.

[4] 18 Pa.C.S. § 4304.

1. S88016/99

stepdaughter while she was between the ages of five and ten. Appellant coerced the child to masturbate him, requested her to perform oral sex on him, and showed her pornographic movies. Appellant also threatened to kill the child's mother if the child reported him. On April 15, 1996[5], Appellant was sentenced to an aggregate term of 36 to 72 months of imprisonment.

On May 13, 1996, Appellant filed a direct appeal. On April 9, 1997, this Court affirmed his judgment of sentence. Appellant thereafter filed a petition for ***allocatur*** with the Pennsylvania Supreme Court which was denied on October 2, 1997. ***Commonwealth v.*** **Sontag,** 698 A.2d 671 (Pa. Super. 1997) (unpublished memorandum), ***appeal denied,*** 550 Pa. 672, 703 A.2d 467(1997).

On October 5, 1998, Appellant filed a pro *se* petition pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et.* ***Seq***[5]. Following the appointment of counsel and the submission of an amended petition, the PCRA court denied Appellant's petition without

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[5] Act of April 13, 1988, as amended, P.L. 336, No. 47, § 3, as amended November 17, 1995, P.L. 1118. No. 32 (Spec. Sess. No. 1), § 1.

a hearing on December 28, 1998. It is from this order that Appellant appeals.

DISCUSSION:

Appellant raises one issue on appeal: whether the PCRA Court erred in dismissing his PCRA petition where trial counsel was ineffective for failing to file a motion to withdraw his plea of nolo contendere. When considering a



challenge to a PCRA court's denial of relief, we must determine whether the court's findings are supported by the record and the order is free of legal error. ***Commonwealth v. Carbone,*** *707* A.2d 1145 (Pa. Super. 1998). If the PCRA court"s order denying relief is free from legal error and is supported by the record, we will not disturb the court's findings. Id.

The PCRA provides as follows:

(a) General rule.--To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

(2) That the conviction or sentence resulted from one or more of the following:

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the

inducement caused the petitioner to plead guilty and the petitioner is innocent.

42 Pa.C.S.A. § 9543 (a)(2)(ii) and (iii).

In order to be eligible for PCRA relief, the petitioner must plead and prove by a preponderance of the evidence, not only an unlawfully induced plea, but also that the petitioner is, in fact, innocent. Appellant has not asserted his innocence in either his original pro se petition or in his amended, counseled petition. He is therefore not eligible for PCRA relief. As such, the PCRA court did not err in dismissing Appellant"s PCRA petition.

1. **S88016/99**

Even if Appellant had asserted his innocence, we find no merit in his claim. Appellant argued that counsel rendered ineffective assistance of counsel in improperly inducing him to plead *nolo contendere by* representing that he would receive a county sentence and in not investigating a prior sexual assault allegedly involving the same victim and a group of neighborhood boys, which could have helped to impeach the victim's potential testimony.

When considering an allegation of ineffectiveness, we must determine whether (1) there is merit to appellant's underlying argument; (2) there was a reasonable basis for counsel's actions, designed to effectuate the client's interests;: and (3) appellant was prejudiced by counsel's act or omission. ***Commonwealth v.* Pursell,** 555 Pa. 233, 724 A.2d 293 (1999), **cert. *denied, Pursell v. Pennsylvania,*** *S.* Ct.

1999 WL 715562 (Nov. 1, 1999). A PCRA petitioner must further establish, by a preponderance of the evidence, that counsel's alleged ineffectiveness so undermined the truthdetermining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S.A. § 9543(a)(2)(ii).

Claims that counsel was ineffective in connection with a guilty plea will provide a basis for relief only if the ineffectiveness caused an involuntary or unknowing plea. ***Commonwealth v. Yager,*** 685 A.2d 1000 (Pa. Super. *1996) (en baric), appeal denied,* 549 Pa. 716, 701 A.2d 577 (1997). To be constitutionally valid, a guilty plea must have been knowingly, voluntarily,



and intelligently made, with an understanding of the nature of the charges, the right to a jury trial and an awareness of the consequences of the plea. ***Commonwealth v. Lewis,*** 634 A.2d 633 (Pa. Super. 1993), ***appeal denied,*** 539 Pa. 689, 653 A.2d 1228 (1994). "Where the record clearly demonstrates that a guilty plea colloquy was conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established." Id. at 635. In determining whether a defendant understood the connotations and consequences of his plea, we must examine the totality of the circumstances surrounding the plea. ***Commonwealth v. Yager, supra.***

Our review of the record reveals that Appellant knowingly, voluntarily and intelligently entered a plea of *nolo contendere*. During the oral colloquy, the trial court adequately addressed the legal and factual basis for the offenses charged. Moreover, the trial court asked Appellant whether he understood the sentencing recommendation made by the Commonwealth, to which he responded in the affirmative, and that the sentencing judge was not bound by that recommendation. Appellant acknowledged that he was satisfied with counsel's representation, had no questions concerning his right to a jury trial, and was not being coerced or promised anything in exchange for his plea, other than what was offered in his plea agreement. As the record clearly demonstrates that a plea colloquy was conducted and that Appellant understood the nature of the charges against him, *see*

***1. S88016/99***

***Commonwealth*** **v. Lewis, supra, Appellant entered** his plea knowingly, voluntarily and intelligently. We therefore find no merit to Appellant's claim[6]

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[6] [6]In regard to Appellant's second argument, Appellant states that the victim testified at the preliminary hearing that she had never spoken to rape counselors prior to doing so in regard to Appellant. Appellant suggests, without substantiation, that the victim committed perjury because she had, in fact, spoken to rape counselors following an incident with neighborhood boys. Appellant argues that counsel might have been able to impeach the victim at trial on the basis of perjury or on the

basis that the molestation was occurring while the victim spoke to the rape counselors but failed to report it at that time. Without independent corroboration of Appellant's claim, we find that it lacks merit. Moreover, because Appellant pled nola *contendere* to the offenses charged, he voluntarily waived his right to challenge the strength of the Commonwealth's case. See N.T., 2/8/96, at 4.

Trial counsel cannot be deemed ineffective for failing to raise meritless claims. ***See Yager, supra.***

CONCLUSION:

Accordingly, we affirm the order entered December 28, 1998, in the Court of Common Pleas of Erie County, denying Appellant post-conviction collateral relief.

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The following brief was before the Superior Court of PA which documents evidence that warranted an evidentiary hearing but for government inference concealing legal error by the Commonwealth of PA, relief could not be granted.

IN THE SUPERIOR COURT OF
PENNSYLVANIA
sitting at Pittsburgh

NO. 00112 WDA 1999

COMMONWEALTH OF PENNSYLVANIA

V.

FRANK J. SONTAG,

APPELLANT

# BRIEF OF APPELLANT

Appeal from the court order denying Motion for Post Conviction Collateral Relief entered by the Erie County Court of Common Pleas, Criminal Division, on December 28, 1998 at docket number 1339 of 1995

William J. Hathaway, Esquire
3820 Liberty Street
Erie, Pennsylvania 16509
(814) 868-8541
PA I.D. No. S619G

Date: March 17, 1999

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## STATEMENT OF JURISDICTION

This Court's jurisdiction to hear an appeal from the Order of the Court of Common Pleas of Erie County, Pennsylvania denying Motion for Post Conviction Collateral Relief, in a matter not within the exclusive appellate jurisdiction of the Commonwealth or Supreme Court, is established by Section 742 of the Judicial Code of July 9, 1976, Public Law 586, No. 142, Section 2, and amended by the Act of April 28, 1978, No. 531, 42 Pa.C.S. Section 742.

## II. FINAL ORDER OF THE COURT OF COMMON PLEAS

COMMONWEALTH OF PENNSYLVANIA
V.
FRANK J. SONTAG

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IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION No. 1339 of 1995

**FINAL ORDER**

AND NOW, this 28th day of December, 1998, it is hereby ORDERED that the defendant's second Motion for Post-Conviction Collateral Relief is DENIED for the reasons set forth in this court's Notice of Intent To Dismiss of December 4, 1998.

The petitioner shall have thirty (30) days from the date of this Order to file an appeal and may proceed either pro se or by hiring private counsel since he is not entitled to court appointed counsel.

ERNEST J. DiSANTIS, JR., JUDGE

## III. STATEMENT OF THE QUESTION INVOLVED

A. WHETHER THE LOWER COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR POST CONVICTION COLLATERAL RELIEF WHICH SOUGHT TO CHALLENGE THE VALIDITY OF HIS GUILTY PLEAS?

## IV. STATEMENT OF THE CASE

The appellant, Frank J. Sontag, was charged with two counts of indecent assault, one count of terroristic threats, two counts of corruption of minors, and two counts of endangering welfare of children relating to alleged sexual abuse perpetrated upon his step-daughter. On February 8, 1996, the appellant, while represented by Attorney David Ridge, entered no contest pleas to the charges. On February 23, 1996, the appellant filed a Motion to Withdraw the No Contest Pleas, which motion was subsequently denied on March 6, 1996. On March 12, 1996, the appellant was sentenced to a term of incarceration of 46 months to 72 months and resentenced on April 15, 1996 to the same term.

On May 13, 1996, a timely Notice of Appeal to this Court was filed from the judgment of sentence with said appeal docketed at No. 876 Pittsburgh 1996. The direct appeal to the Superior Court was denied and a subsequently filed Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied. on or about October 26, 1998, the appellant filed a

Motion for Post Conviction Collateral Relief. on November 24, 1998, courtappointed counsel filed a Supplement to the appellant's pro se PCRA. On December 28, 1998, the lower court denied the PCRA Petition without hearing. On January 11, 1999, the instant appeal was filed.

## V. SUMMARY OF ARGUMENT

The lower Court erred in summarily dismissing the appellant's Motion for Post Conviction Collateral Relief without the provision of an evidentiary hearing for purposes of permitting the appellant to establish a factual record as to the allegations of ineffective assistance of counsel.

The lower Court committed legal error and abused its discretion in denying the appellant's Motion for Post Conviction Collateral Relief in which the appellant sought to withdraw his no contest pleas based upon an allegation of ineffective assistance of counsel in the nature of representations made by counsel that the appellant would receive a more lenient sentence. Moreover, the lower Court erred in failing to find ineffective assistance of .counsel or prosecutorial misconduct in regard to the appellant's allegation that the Children's Services records relating to the complainant's prior involvement with that agency regarding an incident with some minors were not sought by defense counsel or those records were suppressed by the Commonwealth thereby denying him a full and fair opportunity to investigate' and prepare a defense to the criminal charges.

## VI. ARGUMENT OF APPELLANT

A. THE LOWER COURT ERRED IN FAILING TO GRANT THE APPELLANT POSTCONVICTION COLLATERAL RELIEF BASED UPON AN INVALID PLEA.

After a defendant has entered a guilty plea, the only cognizable issues in a Post Conviction Collateral Relief Act proceeding are the validity of the plea and the legality of sentence. Commonwealth v. Martinez, 372 Pa.Super. 202, 539 A.2d 399 (1988). From a guiltl plea, the Petitioner may challenge only whether the plea was proffered in a voluntary and intelligent manner, the legality of the sentence imposed and the competency of counsel. Commonwealth v. Moore, 321 Pa.Super. 442, 468 A.2d 791 (1983). The burden is on the petitioner in a postconviction proceeding to prove that the guilty plea was invalid. Commonwealth v. Carter, 318 Pa.Super. 252, 464 A.2d 1327 (1983).

To be constitutionally valid, a guilty plea must have been made knowingly, voluntarily and intelligently, with an understanding of the nature of the charges, the right to a jury trial and an awareness of the consequences of the plea. Commonwealth v. Kore 521 Pa. 1, 555 A.2d 100 (1971) The threshold inquiry for evaluating claims of ineffective assistance of counsel is whether the issue, argument or tactic which counsel has foregone is of arguable merit. If the argument is of merit, the next inquiry is whether counsel's chosen course of action was designed to effectuate his client's best interests. If a reasonable basis is lacking, the petitioner must demonstrate that counsel's actions worked to his prejudice. The petitioner must then show that but for counsel's challenged strategy, there is a reasonable

probability that the result would have been more favorable to the petitioner. Commonwealth v. Pierce, 515 Pa. 1S3, 527 A.2d 973 (1987) Allegations of ineffective assistance of counsel-relative to a guilty plea will provide a basis for relief only if the ineffectiveness caused an involuntary or unkowning plea. Commonwealth v. Owens, 321 Pa.Super. 122, 467 A.2d 1159 (1983).

The sole cognizable issue raised in the instant postconviction proceeding relates to the validity of the no contest pleas entered by the appellant. The appellant previously filed a Motion to Withdraw Pleas prior to sentencing with the lower Court denying said petition. Thereafter, the appellant filed an appeal to this Court challenging the lower court's denial of his pre-sentence motion to withdraw as well as the lower court's denial of a motion for recusal of the judge. This Court affirmed the judgment of sentence and a subsequent Petition for Allowance of Appeal was denied. The instant claims as to the validity of the no contest plea proceeding are distinct from the claims raised on direct appeal and said claims have not been finally litigated.

Moreover, the instant challenge to the validity of the plea proceeding cannot be deemed to have been waived in that the appellant was similarly afforded ineffective assistance of counsel in that appellate counsel failed to preserve and raise the instant claims on direct appeal relative to challenging the validity of the plea proceeding. Furthermore, the fact that Attorney David Ridge acted in the capacity as both trial counsel and appellate counsel foreclosed his capacity to raise his own ineffectiveness on appeal thereby precluding

any finding of waiver for purposes of post conviction relief. The ineffectiveness of defense counsel must be raised at the first opportunity at which counsel whose ineffectiveness is being challenged no longer represents the defendant. Commonwealth v. Miller, 388 Pa.Super. 7, 564 A.2d 975 (1989).

The appellant challenges the validity of his no contest pleas based upon several allegations of ineffective assistance of counsel and the contention of prosecutorial misconduct . Initially, the appellant avers that he was essentially induced into entering the no contest pleas through representations made by defense counsel as to the prospective sentence that would be imposed upon the entry of a no contest plea. The appellant contends that defense counsel advised him that if he entered the plea the likely sentence would consist of a county sentence with the credible potential for work release. The appellant relied upon this specific representation proffered by defense counsel in deciding to enter the no contest pleas. However, defense counsel lacked any legal or factual basis

render this representation as there was no sentencing recommendation in a plea agreement binding the Commonwealth. Moreover, there was no basis for this representation as a general matter as the sentencing court was not bound to any extent in imposing sentence other than the statutory parameters and in fact the court ultimately sentenced the appellant outside *of the sentencing guidelines to a state sentence. Based upon this material inducement, the appellant was rendered ineffective assistance of counsel that caused him to enter an unintelligent and involuntary plea. Any

representation of counsel in the form of a guarantee or promise of a far lesser sentence than that which is imposed provides a cognizable basis for challenging the validity of the plea. Commonwealth v. Ford, 335 Pa.Super. 398, 484 A.2d 406 (1984).

The appellant alleges that the complainant, Kathyrn Stevenson Boyd committed perjury during the preliminary hearing in denying that she had received counseling by rape crisis or other counselors arising out of a sexual assault or abuse perpetrated by a group of young boys. This alleged sexual abuse perpetrated by several neighborhood boys in the woods behind the complainant's home was investigated by the Millcreek Police and referred to Children's Services for investigation. The appellant has limited knowledge as to the specifics of what occurred with his stepdaughter and he was not directly involved with any of the ensuing involvement of the police or children's services caseworkers.

However, at the time that the appellant was ready to proceed to trial after a jury had been empanelled, the Commonwealth and/or Children's Services possessed the records regarding the complainant's assault by the group of boys.

That evidence was material in that it could have been utilized to impeach the testimony of the complainant in which she denied any prior involvement with crisis counselors. Moreover, there are a myriad of avenues of investigation that could have been pursued by defense counsel relative to this incident. The allegations set forth against the appellant were within the same time period as this incident. If

defense counsel had been privy to the police reports and then sought access to related children's services records, it is evident that material and potentially exculpatory evidence could have been established in terms of whether the complainant made a prompt complaint to the counselors as to the **conduct** of her father. Moreover, defense counsel could have investigated whether there was any improper suggestion or leading by the counselors as to sexual abuse of the complainant or whether there was any motive by the' complainant to fabricate the allegations against her father when there was an actual incident of sexual assault by the group of boys.

The unrefuted fact is that the appellant never had access to the police reports or children's services records relative to an actual and confirmed episode of sexual abuse of the complainant. The reason for this omission could be attributed to the Commonwealth or defense counsel or a combination thereof. If the Commonwealth suppressed this evidence which could have included exculpatory evidence, then there is a credible basis for finding prosecutorial misconduct. Moreover, if defense counsel failed to exhaust all potential defense strategies and investigative leads including this material evidence, then defense counsel rendered ineffective assistance of counsel. In the event of either prosecutorial misconduct or ineffective assistance of counsel or a combination thereof, the appellant could not have entered a voluntary and intelligent plea given the absence or suppression of this evidence that would have supported his innocence and impeached the credibility of the complainant. This ineffectiveness of counsel or prosecutorial misconduct so undermined the

truthdetermining process that the adjudication in the form of an entry of the no contest plea was unreliable as the appellant had no other recourse than to accept the advice of counsel to enter the pleas.

## VII. CONCLUSION

WHEREFORE, in accordance with the foregoing argument, the appellant, Frank J. Sontag, respectfully requests that this Honorable Court exercise its jurisdiction and remand this case to the lower Court with the directive to permit the appellant with leave to withdraw the no contest pleas entered in this case.

Respectfully submitted,
VENDETTI & VENDETTI

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s/ William J. Hathaway
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Attorney for Appellant,
Frank J. Sontag

COMMONWEALTH OF PENNSYLVANIA
V.
FRANK J. SONTAG
::::::::::::::::::::::::::::::::::::::::::::::::::
IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA CRIMINAL DIVISION

NO. 1339 OF 1995

MEMORANDUM OPINION

This memorandum opinion is submitted pursuant to Pa.R.A.P. 1925(a).

A detailed explanation for this Court's rationale denying the Defendant PCRA

relief is found in its final order and opinion and notice filed respectively on December

28, 1998 and December 4, 1998. This Court would also respectfully direct the

Superior Court to the Judgment and accompanying Memorandum Opinion of the

Superior Court dated April 8, 1997 at Superior Court Docket No. 876 Pgh 1996.

This Court believes that a review of those document will show unequivocally that the

Defendant's claims are meritless and that he is not entitled to relief.

For the above reasons, it is respectfully requested that this Court's Order denying

him PCRA relief be affirmed.

DATE: **JANUARY** 28, 1999
RESPECTFULLY SUBMITTED:
s/ Ernest J. DiSantis
Ernest J. DiSantis Judge

Joseph P. Conti, Esquire
District Attorney

William J. Hathaway, Esquire
Attorney for Appellant

COMMONWEALTH OF PENNSYLVANIA
V.
FRANK J. SONTAG
::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::
IN THE COURT OF COMMON PLEADS OF
ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
NO. 1339 OF 1995

## OPINION AND NOTICE

This case comes before this Court on the Defendant's Petition under Pennsylvania's Post-Conviction Collateral Relief Act, 42 Pa. Cons. Stat.Ann. §9541 et seq.. The procedural history of the Defendant's sexual molestation conviction is set forth in the supplemental petition filed by the Defendant's counsel. The procedural and factual background is set forth in this court's memorandum opinion of June 6, 1996, as well as the Superior Court's opinion and order affirming this court dated April 8, 1997.

### 1. LEGAL DISCUSSION

The only issues the Court deems appropriate to discuss are those raised in the PCRA supplement filed on Defendant's behalf by counsel. Any other claims have been addressed by the Superior Court, or are waived by the Defendant's failure to raise them at the first available opportunity. See, 42 Pa. Cons. Stat.Ann. §9544.

### A. The Defendant's Pie

This is not the first time that the Defendant has challenged the validity of his no-contest plea. He did so on direct appeal. However, he now

tries to "end-run" the "previous litigation and waiver" requirements of §9544 by arguing that his former attorney made representations to him which **induced him to enter a plea which he would not have** otherwise entered. See, Defendant's Supplement To PCRA Motion at p. 4. Although PCRA counsel was correct when he noted that a representation of counsel in the form of a guarantee or promise of a far lesser sentence than that which is imposed provides a cognizable basis for challenging the validity of the plea, the Defendant's assertions do not amount to a claim that he is innocent which is a prerequisite for PCRA relief in this context. See, Commonwealth v. Laszczynski, 715 A.2d 1185, 1187-1188 (Pa.Super. 1998). The Defendant cannot now boots-trap that requirement by raising additional claims relative to his plea. In fact, the plea colloquy of February 8, 1996 clearly contradicts the Defendant. That record specifically set forth the sole sentencing recommendation. See page 20-21. Furthermore, the Defendant's waiver of rights form at paragraph 5 unequivocally establishes that the Defendant informed the Court that his plea was not a product of any other promises or inducements. Finally, the Defendant failed to raise (until now) any issue of sentencing promises or representations In spite of the fact that he was resentenced by the Court and knew, by virtue of the original sentence, that a county sentence was highly unlikely. (The sentence was not outside the guidelines. It was rather an aggravated and standard range sentence).

B. Ineffectiveness Of Counsel/Prosecutorial Misconduct

At pages 6, et seq. of his PCRA Supplement the Petitioner attempts to obtain relief by asserting ineffectiveness of counsel and/or prosecutorial misconduct. He does this in order to **avoid the one year time bar of 42** Pa.Cons.Stat.Ann §9545(b)(1). **(The Defendant's** judgment became final on October 2,1997 and his PCRA was filed October 5, 1998). That provision states, in part:

(I) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, I unless the petition alleges and the petitioner proves that:

(1) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States:

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

The PCRA time limitation was recently explained by the Superior Court in Commonwealth v. Thomas, 718 A.2d 326 (Pa.Super. 1998).

In essence, his argument is that either his counsel's ineffectiveness in not obtaining the children's records for review, or the Commonwealth's failure to make this evidence available constitute an exception to the timeliness requirement of the PCRA[1].

---

[1] **Defendant asserts that these records "might" contain evidence that could have been used to challenge the credibility of the victim**

After reviewing the Defendant's claims, the court cannot conclude that he is entitled to relief. First, his ineffectiveness claim against Mr. Ridge, on its face, indicates that the Defendant knew of the "alleged facts" upon which he predicates his complaint at the time he entered his plea. Second, nothing posited by the Defendant in his supplemental petition demonstrates the existence of any exculpatory evidence. Third, if the victim gave a statement at one time denying that she had been involved with counselors relative to another assault, that evidence would be collateral. Any such statement does not amount to one that exculpates the Defendant. Fourth, it appears from the record that the issue concerning an examination of Children Services records (which was requested by Attorney Ridge) was resolved before the plea[1]

[1] **See Judge Stephanie Domitrovich's order of August 7, 1995.** (ref. here page 177)

.Finally, given the speculative nature of the Defendant's claims in this regard, neither an evidentiary hearing nor a -in camera review of the police reports and other records is warranted.

Therefore, this Court finds that the Defendant's case does not fall within the exception to the one (1) year provision of §9545(b)(1).

II. CONCLUSION

After a review of the Defendant's Petition and Supplement filed pursuant to Pennsylvania's PCRA, the Court finds that the Defendant is not entitled to relief and will issue the accompanying Notice.

BY THE COURT:
s/ Ernest J. DiSantis
Ernest J. DiSantis, Jr., Judge

Marshall Piccinini Esquire
Deputy District Attorney

William]. Hathaway, Esquire
PCRA Counsel

David G. Ridge, Esquire

COMMONWEALTH OF PENNSYLVANIA
V.
FRANK SONTAG
::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::
IN THE COURT OF COMMON PLEAS OF
ERIE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

NO. 1339 OF 1995

NOTICE OF INTENT TO DISMISS PCRA WITHOUT HEARING

PURSUANT TO Pa.R.CRIM.P. 1507(a)

**AND NOW,** this 4th day of December, 1998, after having reviewed the defendant's Supplement To Motion For Post Conviction Collateral Relief and for the reasons set forth in its accompanying Opinion, this Court concludes that the defendant's claims are not timely and/or have been previously litigated or waived. Moreover, they are Meritless.

Therefore, the defendant is advised that his Motion For Post Conviction Collateral Relief filed October 5, 1998 and supplement filed November 24, 1998 will be dismissed within twenty (20) days of the date of this notice pursuant to Pa.R.Crim.P. 1507.

BY THE COURT:
s/E.DiSantis
**Ernest DiSantis, Jr., Judge**

Marshall Piccinini, Esquire
Deputy District Attorney

William Hathaway, Esquire
PCRA Counsel

David Ridge, Esquire

IN THE SUPERIOR COURT OF
PENNSYLVANIA sitting at Pittsburgh

COMMONWEALTH OF PENNSYLVANIA
V.
FRANK J. SONTAG

::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::

No. 00112 WDA 1999

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that this date a true and correct copy of the within Brief of Appellant was served upon the following and in the manner noted below in accordance with Pa.R.A.P. 121:

Eleanor R. Valecko (7 copies)
First class mail
Deputy Prothonotary
Superior Court of PA
101S Grant Building
Pittsburgh, PA 1S219

Personal service
Office of District Attorney
Erie County Court House
Erie, PA 16501

s/ William J Hathway
William J. Hathaway Esq

Date: February 16, 1999

## MAIN APPENDIX (C)

UNITED STATES COURT OF APPEALS THIRD CIRCUIT

In Re: Frank J. Sontag, U.S. District Court For The Western
District of Pennsylvania - C.A No. 97-349
affecting
Commonwealth of PA v. Frank J. Sontag - No. 1339 of 1995
Petitioner

V.

U.S. District Court For The Western District of Pennsylvania
Respondent

WRIT OF MANDAMUS

By: s/ Frank J Sontag
Frank J. Sontag, Pro Se
PO Box 11181
Erie, PA 16514
814-323-2777

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11. Appendix (A) Magistrate's Report and Recommendations
Appendix (B) William J. Hathaway's ESQ. Fraud Findings
Appendix (C) Suppressed Millcreek Police Report 87-565-10
Appendix (D) Letter from the Rape Crisis Center; **with** Petitioner's letter 11-5-01 to confirm content

Index of authorities

1. **18 Pa. C.S.A. Section 3126**

2. **In interest of J.R.,** 648 A.2d 28, 436 Pa. Super. 416, Super. 1994, appeal denied 655 A.2d 515, 540 Pa. 584

3. **Com. V. Butler,** 612 A.2d 63 0, 423 Pa. Super. 472, Super. 1993, appeal denied 629 A.2d 1376, 535 Pa. 613

4. **Robinson v. Aryonio 27 F.3d 877,883 (3 rd Cir 1994), vacated on other grounds, 513 U.S. 1186, (1995)**

5. **Navue v. Illinois, 360 U.S. 264,269 (1959)**

6. **Giglio v. United States, 405 U.S. 150, 153-55 (19 72))**

7. **Koch v. Puckett, 907 F.2d 524, 531 (5th Cir. 1990)**

8. **United States v. Gowen, 32 F.2d 1466, 1471 (10th Cir. 1994), cert denied, 513 U. S. 1173 (1995)**

9. **United States v. Agurs 427 U.S. 97, 103 (1976);**

10. **Giglio v. United States 405 U.S. 150, 154 (1972)**
11. **Brady v. Maryland,** 373 U.S. 83, 87 (1963)
12. **Gibson v. Schiedemantel, 805 F.2d** 135, 13 8 (3rd Cir 1986)
13. **Duckworth v. Serrano,** 454 U.S. 1, 3 (198 1)
14. **Hankins,** 941 F.2d at 249-250

15. **Mayberry v. Petsock**, 821 F.2d 179, 184 (3d Cir) cert denied, 484 U.S. 946 (1987)
16. United States v. Bagley, 473 U.S. 667, 682 (1982)
17. Kyles v. Whitley, 514 U.S. 419,435 (1995)
18. Pennsylvania Statute Title 18 Chapter 63
19. Kyles v. Whitley, 514 U.S. 419,435 (1995)
20. Pennsylvania under Title 18 Section 4902
21. The Bill of Rights, Article VI and Article XIV, Section I
22. Howell v. Kraft, 10 Wash. App. 266, 517 P.2d 203 (1973)
23. Turner v. Enders, 15 Wash. Apo. 875, 878, 552 P.2d 694 (1976)

**Statement of the case:**

This is a strict ease of fraud by government officials in Erie Pennsylvania; in conspiracy to

falsify federal court records to maintain an illegal conviction of a U.S. citizen. Magistrate Judge Susan Paradise Baxter in the US District Court of Western Pennsylvania and Chief Judge Sean McLaughlin both were told immediately of the fraud but improperly denied any hearing to expose it. All subsequent appeals and civil suits were thus based on the District Courts rulings and has lead to fruitless action in all courts. After exploring all the ends of justice and with all final appeals exhausted earlier this year; thus this petitioner has only a writ of mandamus to correct such a miscarriage of justice.

The District Court was tricked and conned into denying this petitioner all rights and privileges guaranteed by State and Federal Law. Because the criminal activities were also committed at the trail court with Judge Ernest DiSantis at the Common Pleas Court in Erie PA the evidence was presented in the District Court under appellate jurisdiction for the constitutional violations. Moreover, because Judge DiSantis refused to recuse himself and the fact that this petitioner was aware of fraud at the trial court level without perjury proof at the time he could not present the actual fraud and biases at the trial court level because of all the government interference. Further, it denied my trail counsel the only defense evidence that could have impeached the only key witness and denied trail counsel the opportunity to generate a perfect appeal. Because of government interference and the continuous fraud by state and local government officials this petitioner has lost his US constitutional rights in every court of law.

**Statement of jurisdiction**

This court jurisdiction is invoked pursuant to Rule 21 of the Federal Rules of Appellate Procedures. Petitioner has exhausted all other remedies in the courts. Constitutional violations occurring in the District Court of Western Pennsylvania, which was improperly dismissed, has affected every subsequent court filing. After filing a criminal complaint with the FBI and showing them this evidence they told me the courts should handle this. Based upon the government interference shown here the only available remedy available to this petitioner is a writ of mandamus to the higher court.

**Issues Presented**

State and local officials willfully and maliciously committed fraud in the District Court of Western Pennsylvania by telling the District Court that: the attached Millcreek Police Report, Appendix (C ) documents in question were legally dismissed in a motion at trial court; when there were not. As the evidence presented will show, the documents were never dismissed in a any motion at trial court, and that state and local officials fraudulently tricked the District Court of Western Pennsylvania by falsifying the court's records which has further denied this petitioner constitutional rights.

Thus the District Court of Western Pennsylvania improperly dismissed this petitioner's claims to examine the fraud by state and local officials in Pennsylvania, used the fraud against this petitioner, and the only specific remedy available is a writ of

mandamus to correct this miscarriage of justice.

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Statement of facts

On October 3 1 , 1997 this petitioner filed -the Instant Petition for Writ of Habeas Corpus at the district court showing the unconstitutional incarceration for violations of his "right to a fair trail (a Brady claim), the judge's failure to reclus himself and other related claims. On August 19th 1999 the district court issued the MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION. See: (Appendix "A"). The magistrate report found that the petitioner's claims were cognizable in federal habeas corpus proceedings. On page I I of the magistrate report it also states that the court will

addressed the merits of all of Petitioner's claims (both exhausted and unexhausted); but the court addressed the merits with fraud - the evidence in Appendix (B) proves the falsification of the court records by state and local officials in Pennsylvania. Thus the district court rulings were fraudulent because the rulings were based on the fraud of state and local officials in the state of Pennsylvania saying that evidence was excluded when it was not: this can be seen starting on page 28, lines 4-13 of the magistrate's report and recommendations in Appendix (A):

**"Petitioner also claims that Attorney Ridge was ineffective** on **direct appeal for failing to raise as an appellate issue the suppression of the evidence that would have supported petitioner's innocence and impeached the**

**credibility of the complainant. The suppression of this evidence was made via an evidentiary ruling by the trial court. The evidence to which petitioner refers is the evidence that the child victim had been involved in an alleged sexual assault and subsequent rape**

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**counseling-in March of 1987. Petitioner further claims that Attorney Ridge was ineffective on direct appeal for failing to raise his own ineffectiveness at trial in allowing the perjured testimony by the victim at the preliminary hearing to go uncorrected. Again, the perjured testimony to which petitioner refers is the testimony regarding the incident and subsequent counseling in March 1987. The, evidence was excluded after an evidentiary determination make by trial court."**

(The documents by William I Hathaway, ESQ. in Appendix (B) proves without doubt that the local and state officials in Pennsylvania willfully and maliciously committed fraud in this district court by documenting and falsifying the record stating that the evidence was excluded when it was not.) SEE Appendix (13): where William J. Hathaway, ESQ. documents:

"The Motion of limine was in regard to the Commonwealth's effort to exclude certain evidence of an alleged sexual assault against the child victim by a group of young boys and the subsequent rape

counseling engaged in by the child victim

documented in the file and the Motion of Limine is not

included ..... Therefore, in regard to your directive to me, I can

state my findings that I did not locate any evidence of record as to the Motion of Limine referenced by Judge Baxter."

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**Argument**

In Pennsylvania the law reads under 18 Pa. **C.S.A. Section 3126,** Note 21 states: "Testimony of victim, standing alone, is sufficient to convict in sex offense prosecutions. In interest of J.P.,648 A.2d 28, 436 Pa. Super. 416, Super. 1994, appeal denied 655

A.2d 515, 540 Pa. 584."

18 Pa. **C.S.A. Section 3126,** Note 17 states: "In prosecution for indecent assault, endangering welfare of child, and corrupting minors, exclusion of victim's reputation in community for untruthfulness was reversible error. See Com. **V. Butler,** 612 A.2d 630, 423 Pa. Super. 472, Super. 1993, appeal denied 629 A.2d 13 76, 5 3 5 Pa. 613.

In this case, we go beyond untruthfulness because we're dealing with perjury of the state's key witness and the willful and malicious fraud by state and local officials of Pennsylvania to cover up that perjury and other crimes of government interference. And this

fraud in Pennsylvania has affected every subsequent appeal and motion (criminally

a nd civilly); this petitioner has now officially exhausted all court remedies earlier this

year. This petitioner then filed a criminal complaint in May 2005 with the FBI in Erie, Pennsylvania. The FBI told this petitioner to have the courts correct it as there are too

many officials involved- thus the filing of this Writ of Mandamus.

Let me first show that the fraud by state and local officials is shown throughout the district court's report: Example on page 31 and 32 in the magistrate report Appendix (A) states on line 13, Page 31-32:-

**"Petitioner claims he was the victim of prosecutorial misconduct in that the Commonwealth did suppress or did not disclose material evidence that was favorable to the Petitioner. Proposed Second Amendment to the Petition,**

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undocketed, page 13. The material evidence to which Petitioner refers is the allegedly perjured testimony of the child victim at the preliminary hearing denying that she had been counseled by the Rape Crisis Center following a March 1987 sexual assault by, a group. of young, boys. Id. Petitioner claims that the Commonwealth knowingly presented this false testimony at the preliminary hearing. Id. At 14. Petitioner further claims that he wanted to use this evidence to impeach the credibility of the

victim. Id. Evidence of the counseling following the incident was suppressed by the trial court. This issue has not been raised in any state court and, therefore, has not been exhausted.

A defendant's right to due process is implicated when the state obtains a conviction based upon testimony the state knows to be perjured. Robinson v. Arvonio, 27 F.3d 877,883 (3rd Cir 1994), vacated on other grounds, 513 U.S. 1186, (1995) Citing Napue v. Illinois, 360 U.S. 264,269 (1959) and Giglio v. United States, 405 U.S. 150, 153-55 (1972)). A conviction obtained through the use of false evidence violates the Fourteenth Amendment even when the state, although not soliciting false evidence, Allows it to go uncorrected when it appears. Napue, 360 U.S. at 269. The state's knowing use of perjured testimony to obtain a conviction constitutes constitutional trial error. Robinson, 27 F.3d at 884. A bare allegation that a prosecution witness gave perjured testimony neither establishes a due process claim nor warrants an evidentiary hearing to be further explored. Koch v. Puckett, 907 F.2d 524, 531 (5 th Cir. 1990). There must be an allegation of specific evidence that the prosecutor knew to be false. Even with more than a bare allegation of perjury, if the matter is fully explor ed before a jury, it is exclusively a matter of the



jury. **United States v. Gowen, 32 F.2d 1466, 1471 (10' Cir. 1994), cert denied, 513 U. S. 1173 (1995). The petitioner must shown the materiality of the alleged perjured testimony, ie that there was a reasonable likelihood that**

**the false testimony could have affected the verdict. See United States v. Agurs, 427 U.S. 97, 103 (1976); Giglio v. United States, 405 U.S. 150, 154 (1972). In the present case, Petitioner Sontag cannot demonstrate with a reasonable likelihood that this evidence (of whether the complaining victim was the victim of a prior sexual assault and was subsequently counseled by the Rape Crisis Center) was material to the criminal charges he faced. Petitioner has not shown that with this introduction of this evidence his jury trial would have resulted in acquittal. Based on the suppression of this evidence (by evidentiary ruling of the trial court ), Petitioner pled no contest thereby accepting the Commonwealth's case against him."**

The above proves without doubt that state and local officials knew they were committing fraud by knowingly falsifying the court records and denied this petitioner any due process of law. Many of the court rulings from the district court had repeatedly referenced the state and local officials' fraudulent documents and the repeated claims of fraud by this petitioner in all subsequent courts prove this is not just some procedural error by state and local officials, they have willfully and with forethought have refused to correct the constitutional violations and injustices shown here -Appendix (B) documents this evidence.

As can be seen, statements in this argument are supported by Appendix (A & B) showing that all subsequent appeals, motions, and civil suits have used the fraudulent record of the district court to further deny this petitioner his constitutional rights. Thus upon exhausting all remedies including appeals through state and

federal courts earlier this year this petitioner contracted the FBI on or about May of 2005 to file criminal charges. The FBI insisted that 1. get an attorney to verify the fact that this fraud was indeed committed. On June 22, 2005 William J. Hathaway, Esq., see Appendix (B), confirmed the claims by this petitioner, that indeed the evidence of fraud by state and local officials in Pennsylvania was committed. Since so many state and local officials are involved the FBI told me to have the courts correct it and thus. the filing of this important writ of mandamus.

The District Court of Western Pennsylvania clearly abused its discretion when this petitioner repeatedly argued that the material evidence (Millcreek Police Report 4 87- 65-10) see: Appendix ( C ) was not excluded after an evidentiary determination made by the trail court or Motion of Limine or by any other motion or evidentiary hearing in trial court or whatever they want to call it - the facts are same - a denied sexual assault and subsequent sexually counseling at Rape Crisis, as the following proves. See line 11, page 28 of Appendix (A) the district court states:

**"The evidence was excluded after an evidentiary hearing made by trial court. This court need not examine the evidentiary ruling by the state trial court".**

Petitioner notes in the magistrate report Appendix ( A ) page 28 footnote 10 shows that:

**"The Commonwealth has failed to provide this Court**

**with the documents relating to this evidentiary hearing."**

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We now see in Appendix (B) that there was willful and malicious fraud committed by state and local officials in Erie PA. This fraud is proven by the document by William J. Hathaway, Esq. who documents the following:

"There are 57 items documented in the file and the

Motion of Limine is not included
Therefore, in regard

to your directive to me, I can state my findings that I did not
locate any evidence of record as to the Motion of Limine
referenced by Judge Baxter."

This fraud by state and local officials in Pennsylvania has affected numerous rulings and these rulings have undermined all subsequent appeals and remedies in every court of law. Another improper ruling is in the Magistrate's report and recommendations page 33 on or about line 20, see Appendix (A). The fraud by state and local officials destroyed the argument concerning my Brady claim see: **Brady v. Maryland,** 373 U.S. 83, 87 (1963): as this district court recorded this:

**"However, the suppression of evidence to the Brady Court refers is the nondisclosure of exculpatory evidence to defense counsel, not, as is the case here, the exclusion of evidence**

**at trial by way of an evidentiary ruling by the trial court.**

Thus since the exclusion of evidence at trial was not excluded in any motion at trial court as seen by the evidence in Appendix (B) by William J. Hathaway ESQ. the petitioner's due process was effected by this fraud by state and local officials in

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Pennsylvania.

It is further noted, that for all the government interference: this petitioner should not be forced to address state exhaustion rules, this petitioner has no opportunity to obtain redress,, in any other **court,** and the state corrective process is so defective as to render any effort to obtain relief futile. State exhaustion is not required as see in **Gibson v. Schiedemantel,** 805 F.2d 135, 138 (3d Cir 1986) citing **Duckworth v. Serrano**, 454 U.S. 1, 3 (198 1) See also **Hankins,** 941 F.2d at 249-250 (exhaustion is excused if state process offers no hope of relief). Additionally, as in this case, where **"state officials have interfered with a habeas petitioner's utilization of state remedies," exhaustion is not required. Mayberry v. Petsock,** 821 F.2d 179, 184 (3 d Cir) cert denied, 484 U.S. 946(1987).

This petitioner has claimed all along that the suppression of evidence was favorable to this petitioner, violated his due process and the evidence was material either to guilt or to punishment, irrespective of good faith or bad faith by the prosecution. Beside the state and local fraud committed in the district court, the

district court improperly says the petitioner cannot demonstrate with a reasonable likelihood that this evidence was material to the criminal charges he faced, but the district court failed to understand that the charges alleged against him were from 1986 - 1992. This indecent assault by four boys with a knife happened in 1987 as seen in Appendix (Q. We have two indecent assaults going on at the same time. The real one is factually denied as seen here on page 29 of the magistrate report Appendix (A) line 8:

**Trial counsel asks the victim: "When you were younger you had**

**to go talk to people from Rape Crisis. Do you remember talking to**

14

**people from Rape Crisis when you were younger?"**

**Victim answers: "No"**

**On line 15, trail counsel asks: "Do you remember talking to some**

**counselor when you were younger?"**

**Victim answers: "Yes, <u>But they never asked about - if I was ever</u>**

**<u>sexually abused."</u>**

**Then on page 30 of magistrate report line 12 trial counsel asks:**

**You didn't talk to that counselor as all about sex of any type?"**

**Victim answer: "No"**

The induced prejudice of the district court and the fraud of Mr. Piccinini mislead us to believe that the documented meetings at Rape Crisis by a sexual counselor named Kathy Peterson would not have talk about sex of any type after a reported indecent assault with four boys with a knife, but the letter from Rape Crisis see Appendix (D) shows that this is a sexual event referenced in the suppressed Millcreek Police Report. It is only reasonable then that if trial counsel had the suppressed evidence and the preliminary hearing testimony, trail counsel could have shown the victim remembered minute details from 1986 against this petitioner; but couldn't remember anything about a real indecent assault, going to Rape Crisis, and couldn't remember anything about

sexual counseling with Kathy Peterson (Appendix (D)) concerning the an illegally suppressed Millcreek Police Report:# 87-565-10 1 Append ix ( C) } an alleged indecent assault with four boys with a knife. Trial counsel could have also brought up impeachment proceedings with the suppression evidence. If a reasonable mind was told that a



documented indecent assault in 1987 involving the Rape Crisis Center with sexual counseling was denied and another indecent assault was remembered in detail to win a deadly custody battle which also could have been proven then by James Moran ESQ., with an evidentiary hearing: there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. The evidence says she did talk to Rape Crisis and there is certainly a reasonable probability that Rape Crisis would have talk about sexual activity involved in the suppressed of Millcreek Police Report #87-565-10. See **United States v. Bagley,** 473 U.S. 667, 682 (1982) (a reasonable probability is a probability sufficient to undermine confidence in the outcome); **Kyles v. Whitley,** 514 U.S. 419, 435 (1995)(Brady claim sustained by showing that favorable evidence withheld could reasonably be taken to put whole case in such a different light as to undermine confidence in verdict).

There is more criminal activity here than meets the eye. All the investigative authorities by statutory law including but not limited to the DA's Office, Rape Crisis and the Office of Children and Youth knew the truth or should have, and the investigations naturally

continued after the preliminary hearing which showed the perjury See Appendix (A) pages 28-30. These agencies saw that the victim testified that she never talked to anyone at Rape Crisis Center and never talked about sex of any kind with any counselor; they also had the Millcreek Police Report and they had the place and sexual counselors name (Kathy Peterson) so they knew the perjury of these statements and not one of them reported these untruths to anyone as they prejudicially or wrongfully sat on the evidence in their procession all along. This petitioner will not detail the court with all the team investigations covered in Pennsylvania Statute Title 18 Chapter 63 but only



includes linking all state and local officials involved under Pa Statutory Law. Thus because of all the state and local government interference, there was: no defense or legal action for the untruthfulness, penury, and fraud.

The elements of a Brady claim were clearly satisfied if the state and local officials have not committed fraud again in the district court: the evidence was suppressed, it was favorable to this petitioner, and it was material to guilt or punishment. And had this petitioner had this evidence a no contest plea would have ever been forced upon him by the state and I could have gone to trial and as a note, this petitioner has always claimed his innocence to the charges.

So which indecent assault story should we believe? Surely if we had both indecent assault

stories being committed at the same time this evidence could have affected the outcome and there is a reasonable probability sufficient to undermine confidence in an outcome. See Kyles v. **Whitley,** 514 U.S. 419,435 (1995). Again the district court's failure to grant a hearing into the state and local fraud has affected every subsequent legal remedy. And this petitioner cannot stress enough that the court records now are in such a false, biased and fraudulent condition that any other remedy other than a writ of mandamus is fruitless.

As a pro se litigant I have shown repeatedly, without prejudice, serious constitutional violations to all the courts - two or three times - and nothing has happened. I always thought justice would prevail; but unlike the FBI, no court ever told this petitioner that the courts needed a real attorney to confirm this petitioner's claims of penury and fraud before a hearing would be granted.

This petitioner has shown the elements for the crime of penury against state and local officials in the state of Pennsylvania under **Title 18 Section 4902** which states: (a) Offense defined.- ...makes a false statement under oath or equivalent affirmation .... (b) Materiality. -Falsification is material....( c) It is not a defense to prosecute under this section that the oath or, affirmation was administrated or taken in an irregular manner...."

This pro se petitioner has shown the general elements for the crime of fraud against state and local officials in Pennsylvania occurring in the District Court in the Western District of Pennsylvania under **Howell v. Kraft, 10 Wash.** APP. 266, 517 P.2d 203 (1973). Those elements

generally are: (1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of itstruth, (5) his intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) his right to rely upon it, and (9) his consequent damage. See Turner v. Enders, 15 Wash. App. 875, 878, 552 P.2d 694 (1976).

This fraud violated this petitioner's constitution rights under **The Bill of Rights, Article VI and Article XIV, Section** 1 and/or other Amendments that this court may recognize because of limited legal knowledge as a pro se litigant.

The state and local officials have also claimed absolute immunity in the civil courts and this miscarriage of justice continues as they refuse to correct this fraud. Thus all the petitioner's remedies have been exhausted and a Writ of Mandamus is the extreme remedy necessary to resolve this miscarriage of justice.

Prayer

This petitioner requests that this court order the U.S. District for the Western District of Pennsylvania to address the state and local frauds, to correct all the court records, and determine all the real parties of interest in this fraud scheme in Pennsylvania which has been presented in the foregoing and appendixes. This petitioner requests this court to address any matter presented here as this court may deem necessary, including indictments, to resolve these issues. And/or in the alternative, this court should make sure that any State that refuses to uphold the United States Constitution faces the wrath of the Federal Courts and set up procedures that will prevent this heinous activity from happening in the future. This Federal Court should find a way to make sure that the penalties against a state committing such injustices against our U.S. Constitution are severe enough to ensure that they never cross that line again; the citizens of this United States deserve such protection from state fraud and they deserve the fairness and leadership from our Federal Court Systems; our only real check and balances for state violations of our U.S. Constitution.

PS: I've called numerous attorneys and most had little or no experience in drafting a writ of mandamus like the one presented. As a pro se litigant I ask this court to offer any leeway to correct any procedural errors that I may have committed. I attest the foregoing is true to the best of my knowledge under the federal codes of perjury and certify that any copies supplied by this petitioner are from unchanged originals except for fact that more falsification of documents by the state of Pennsylvania may

have occurred without this petitioner's awareness.

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Respectfully submitted this 13th day of December 2005

Frank J. Sontag

PO Box 11181

Erie, PA 16 504

814-323-2777

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**APPENDIX SUB (A)**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

FRANK SONTAG C.A. No. 97-349 Erie

Petitioner District Judge McLaughlin
Magistrate Judge Baxter

VS.

NEAL MECHLING

Respondent.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the instant *Petition for Writ of Habeas Corpus* be denied and that a certificate of appealability be denied. Petitioner's Motion to Amend the Petition [Document # 17] should be denied as futile. Petitioner's Motion that State Exhaustion 3 Requirement be Waived (Document # 20] should be denied. By separate order this same day, Petitioner's Motion for Judgment on the Pleadings [Document 211 is granted and Petitioner's 14 Motion for Intervention [Document 23] is dismissed as moot.

II. REPORT

Petitioner, currently incarcerated at the State Correctional Institution at Waynesburg, 18 Pennsylvania, brings *this habeas* corpus petition pursuant to 28 U.S. C. § 2254, alleging that he is being unlawfully detained because of constitutional violations relating to *his* "right to fair trial by judge's failure to reclus [sic] and excessive punishment." Petitioner is appearing before this Court pro se. For the reasons set forth below, this petition should be denied.

*A. Relevant History* and Procedure

On April 19, 1995, Petitioner was charged with two counts of Indecent Assault, 18 Pa.

C - S. A. § 3 126(a)(6), two counts of Corruption of Minors, 18 Pa. C. S. A. § 63 0 1, two counts of Endangering the Welfare of Children, 18 Pa.C.S.A. § 4304, and one count of Terroristic Threats, 18 Pa. C. S.A. § 2706 in the Erie County Court of Common Pleas. The charges stemmed from a continuous course of sexual assault by the Petitioner upon his step-daughter from June of 1986 through October, of 1992. On May 23, 1995, a preliminary hearing was held at which time Petitioner was represented by counsel. At the hearing, the child victim set forth in detail how Petitioner molested her on a regular basis during the years they lived together. Petitioner was present at all times during the hearing. On February 7, 1996, jury selection was conducted. Petitioner was present at all times and assisted his attorney, David Ridge, in the jury selection process. The final panel included eleven women and one man

and was empaneled and sworn. On February 8, 1996, the sworn jury
*C)* reconvened and prepared to hear testimony. All Commonwealth witnesses, including the child victim, w ere present, Prior to testimony beginning in this case, however, Petitioner's counsel and Assistant District Attorney Marshall Piccinini came to a plea agreement. Petitioner agreed to plead no contest and the District Attorney would recommend concurrent sentences on the various counts. The parties advised the Honorable Ernest J. DiSantis of the plea agreement and defense counsel advised the court of Petitioner's displeasure with the composition of the jury and is his dissatisfaction with the court's prior granting of the Commonwealth's motion in *limine* excluding some defense evidence. Do- cument # 6, unnumbered page 2. As a result of the motion in limine evidence of an alleged sexual assault against the child victim by a group of young boys (and subsequent rape counseling) was excluded. After a lengthy colloquy by the trial court, Petitioner entered his plea and the jury was dismissed. Document # 6, State Court Record, Section IV, d. Sentencing was scheduled for March 11, 1996. On February 23, 1996, Petitioner filed a Motion to Withdraw his Plea. A hearing on the motion was held on March 4, 1996. On March 6, 1996, Judge DiSantis denied the Motion to Withdraw the Plea and filed a written Opinion, Document # 6, State Court Record, Section IV. The court analyzed Petitioner's motion in accordance with the two-part test of Commonwealth v. Miller, 432 Pa.Super. 619, 639 A.2d 815 (1994). Judge DiSantis explained that there is no right to withdraw one's plea and characterized the Miller test as allowing the withdrawal for any fair and just reason so

long as there is no substantial prejudice to the prosecution. Judge DiSantis cited seven reasons that the prosecution would be substantially prejudiced by the withdrawal of Petitioner's no contest plea:

1) At the time of the entry of his plea, the Defendant was represented defense counsel who had engaged in extensive consultation with him;

2) an extensive plea colloquy as conducted with the Defendant prior to the entry of his plea that ensured that he fully understood its ramification;

3) the Defendant is an intelligent, forty-seven year old man capable of making informed decisions;

4) the Defendant was when he advised this Court that he was knowingly, voluntarily, entering the plea free from any threats, promises or inducements; an assertion which would appear to be disingenuous given his current position;

5) the jury had been selected and sworn and were prepared to hear the case. **(There is some indication that the Defendant did not like the make-up of the jury, i.e., eleven women and one man. This is an important consideration);**

6) the Commonwealth had produced who were present in the courthouse prepared to testify. This included the victim, a fourteen year old girl;

7) the nature of the charges, child sexual abuse and the preparation for trial, particularly the impact upon victim and her family. Because of the pleas, she was relieved from experiencing the ordeal of a trial. To allow the Defendant to withdraw

the plea will now place the victim on an emotional roller coaster because she will have to re-prepare herself (as well as will her family) to testify.
Id. (emphasis added).
On March 12, 1996, Petitioner was sentenced as follows:
Count One: Twelve to twenty-four months consecutive to Count Two
Count Two: Eighteen to thirty-six months
Count Three: Six to twelve *months consecutive* to Counts One and Two
Count Four: Six to twelve months concurrent to the above
Count Five: Six to twelve months concurrent to the above
Count Six: Six to twelve months concurrent to the above
Count Seven: Six to twelve months concurrent to the above
Subsequent to the sentencing, a timely motion for reconsideration was filed. The court ordered that the original sentencing guidelines were inaccurate because of improper grading and subsequent calculation relative to Count One and granted reconsideration, thereby vacating Petitioner's original sentence. On April 15, 1996, Petitioner was resentenced. The new sentence was identical to the original sentence imposed, taking into account what the trial court believed to be the correct sentencing guidelines. The trial court restated its reasons for the aggravated sentence citing the lengthy and continuous course of conduct, the age and familial relationship of the victim and the victim impact statement. A timely motion for reconsideration of sentence was filed and later denied. Petitioner appealed to the Pennsylvania Superior Court raising the

following issues, which we quote verbatim from the state court record:

**1) Whether the trial court erred in denying the appellant's motion to withdraw his no contest plea, since appellant's timely filing of the motion to withdraw his no contest plea, his assertion of innocence and the total lack of any prejudice to the Commonwealth all required that he be permitted to withdraw his plea and proceed to a jury trial?**

**2) Whether the appellant's sentence was clearly unreasonable and manifestly excessive since the aggravated range sentences failed to take into account the mitigated factors the defense offered, and since it was based upon factors already considered by the two counts of the criminal information and the guidelines themselves, and where the same court on the same day sentences a similarly charged defendant to a standard range sentence using the August 1994 guidelines which it failed to apply in the appellant's case?**

**3) Whether the court erred in refusing to recuse itself from the sentencing proceeding. The failure to recuse was an abuse of discretion since the court had made pre-sentencing determination as to the appellant and the complainant?**

State Court Record, Section 111, a (emphasis added).

On April 3, 1997, the Pennsylvania Superior Court affirmed the judgment of the trial court by written opinion. Id. The appellate court concluded that the trial court had applied the proper analysis in determining Sontag's motion to withdraw his plea and in light of the showing of substantial prejudice to the prosecution, along with the allegation of jury

manipulation, the trial court's decision was proper.[1] On the issue relating to' an unreasonable and excessive sentence, the Superior Court concluded that because the sentences imposed were within the statutory limits, there was no valid claim as to excessiveness. The court went on to explain that the trial court "... adequately supported its sentence within the aggravated range." Id. at 21. On the recusal issue, the Superior Court determined that Sontag hid not produced any evidence of bias or impartiality of the trial judge. Appellant's contention that the aggravated sentence was evidence of bias was rejected as the court noted that the aggravated sentence was amply supported by the record." Id. at 24.

On March 29, 1997, Petitioner filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, In that petition, be alleged the same three claims of error appealed to the Superior Court. By per curiam

[1] "We find little difference in the desired result: to gain access to a second jury more to an appellant's liking. For this reason, although the allegation of manipulation of jury selection may not have been enough to vitiate appellant's claim of innocence, by itself, we find that the additional considerations of the empaneling and swearing in of the jury, along with the young victim's distress in having to testify once again, support the trial court's finding that the Commonwealth would be substantially prejudiced by Appellant's plea withdrawal." State Court Record, Section III, a, page 14.

order dated October 2, 1997, the Supreme Court of Pennsylvania denied the petition for allowance of appeal.

**B. The Instant Petition for Writ of Habeas Corpus**

On October 31, 1997, Petitioner filed the instant petition for writ of habeas corpus. Petitioner premises his unconstitutional incarceration on violations of his "right to a fair trial by my peers, judge's failure to reclus [sic] and excessive punishment." Document # 3, Petition, unnumbered page 4. On December 22, 1997, Respondents filed a response to the petition. Document # 6. On February 12, 1998, Petitioner filed a motion to amend his original petition which was granted by this Court. amended petition is a five page narrative by Petitioner describing his long ordeal with the allegedly false accusations of sexual abuse by his step-daughter Kathryn Boyd. Document # 19. Petitioner's main argument seems to raise issues of due process, malicious prosecution, and, indirectly, ineffective assistance of trial Counsel[2].

[2]A pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerngrr, 404 U.S. 519, 520-521(1972), quoting Conley v. Gibson 355 U.S. 41, 45-46 (1957). If the court can reasonably read pleadings to state a valid claim on **which the litigant could prevail, it should be done** so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleading requirements. Boag v. MacDougall, 454 U.S. 364 (1982); United States ex rel. Montgomery v. Bierley 141 F.2d 552, 555 (3d Cir. 1969)(petition prepared by a prisoner may be inartfully drawn and

Respondent filed a Response to the amended petition. Document # 13. Petitioner filed a Traverse to the Response. Document # 14. In addition to the petition for habeas corpus relief, presently before this Court are several motions filed by Petitioner. Petitioner's second motion to amend his petition was filed on January 28, 1999. Document # 17. Respondent has not filed any pleading addressing Petitioner's second motion to amend. Petitioner has also filed a motion that state exhaustion requirements be waived [Document # 20], a motion for judgment on the pleadings [Document # 21], and a motion for intervention [Document # 23].

**C. Claims Cognizable in Federal Habeas Proceedings**

A state prisoner may seek federal habeas corpus relief only if he is in custody in violation of the United States Constitution or federal law. 28 U.S.C. §2254(a). Smith v. Philli s 455 U.S. 209 (1982); Geschwendt v. Ryan 967 F.2d 877 (3d Cir.), cert. *denied,* 506 U.S. 977 (1992); Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir.), *cert. denied,* 502 U.S. 902 (1991). Violations of state law or procedural rules alone are not sufficient; a petitioner must allege a deprivation of federal rights before

should be read "with a measure of tolerance'); Smith v. U.S. District Court 956 F.2d 295 (D.C.Cir. 1992); Freeman *V.* Department of Corrections, 949 F. 2d 3 60 (1 Oth Cir. 199 1). Under our liberal pleading rules, a district court should construe all allegations in a complaint in favor of the complainant. Gibbs v. Roman, 116 F.3d 83 (3d Cir. 1997). *See, e.g.,* Nami v. Fauver, 82 F-3d 63, 65 (3d Cir. 1996);

Markowritz v. Northeast Land C mpg", 906 F.2d 100, 103 (3d Cir. 1990).

habeas relief may be granted. Engle v. Isaac 456 U.S. 107 (1982); Wells v. Eetsock, 941 F.2d 253 (3d Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992). A federal court's scope of review is limited as it does not sit to retry state cases *de novo* but examines the proceedings in the state court to determine if there has been a violation of federal constitutional standards. Barefoot v. Estelle, 463 U.S. 880 (1983); Milton v. Wainwright 407 U.S. 371(1972). A habeas petitioner must show that the state court's decision was such a gross abuse of discretion that it was unconstitutional; "ordinary" error is outside the scope of § 2254.

In the Response, Respondent argues that

> Sontag has plainly failed to satisfy this standard by failing to allege the deprivation of any federal rights whatsoever, This is most clearly evidenced by the fact that Sontag has merely provided this Court with three unsubstantiated allegations without any factual support. More over, his petition fails to cite even one federal case, or any state case for that matter. Therefore, his petition fails to allege a deprivation of federal rights. Further, Sontag has failed to show, or even claim, that the state courts decisions were such a gross abuse of discretion that they were unconstitutional. Hence, Sontag's Petition for Writ of Habeas Corpus should be denied for his failure to allege, much less establish, a deprivation of federal rights.

Document 6 Response to Original Petition, unnumbered pages 7-8.[3] This Court disagrees.

Most of Petitioner's myriad allegations (of excessive sentence, cruel and unusual punishment, ineffective assistance of counsel, right to fair and impartial trial, and due process) implicate rights guaranteed by the United States Constitution. *See U.S.* Const. Amend. VIII (prohibition against cruel and unusual punishment); Solem v. Holm, 463 U.S. 277 (1983)("The Eighth Amendment prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."); U.S. Const. Amend. VI (right to counsel); Stickland v. Washington, 466 U.S. 668, 686 (1984)("the right to counsel is the right to the effective assistance of counsel"); U.S. Const. Amend. V (due process); U.S. Const. Amend. XIV (due process); Weiss v. United States, 5 10 U.S. 163, 178 (1994)'It is elementary that a fair

[3]Similarly, in the Response to the Amended Petition, Respondent contends that:
a habeas petition must allege a deprivation of federal rights before habeas relief may be granted. Sontag has plainly failed to satisfy this standard by failing to allege the deprivation of any federal right whatso
This is most clearly evidenced by the fact that Sontag has merely provided this Court with three unsubstantiated allegations without any factual support. Moreover, his petition fails to cite even one federal case, or any state case for that matter. Therefore, his petition fails to allege a deprivation of federal rights.

Document 13, Response to Amended Petition, unnumbered pages 6-7.

trial in a fair tribunal is a basic requirement of due process."). Additionally, the form (supplied by the U.S. Clerk of Courts) upon which Petitioner submitted his original petition for writ of habeas corpus clearly states "no citation of authorities need by furnished." In sum the Court finds that 41 Petitioner's claims are cognizable in federal habeas corpus proceedings.

D. Exhaustion

Before a federal court addresses the merits of a state prisoner's claims, constitutional and federal law issues first must have been fairly presented to the state courts through direct appeal, collateral review, state habeas corpus proceedings, mandamus proceedings, or other available procedures for judicial review. *See, e.g.*, Castille v. People , 489 U.S. 346, 351 (1989); Picard v. Conno , 404 U.S. 270, 275 (1971); Doctor v. Walters, 96 F.3d 375, 678 (3d Cir. 1996); Burkett v. Love , 89 F.3d 135, 137 (3d Cir. 1996). 28 U.S.C. § 2254(b) requires a state prisoner to exhaust all available state court remedies before seeking federal relief This exhaustion requirement serves to protect the interest of comity, which ensures that the state courts have the first opportunity to address and correct violations of state prisoners' federal lights. Rose v. Lundy 455 U.S. *509, 518 (1982);* Preiser v. Rodriguez, 411 U.S. 475, 491 (1973). Generally, in *15* order to satisfy the exhaustion requirement, "a state prisoner seeking federal habeas relief must present each of his claims to the state's highest court." Story v. Kindt, 26 F.3d 402, 405 (3d Cir.

1994). *See* also Wojtczak v. Fulcomer, 800 F.2d 353 (3d Cir. 1986). The petitioner has the burden of establishing that exhaustion has been met. Ross v. Petsock 868 F.2d 639, 643 (3d Cir. 1989); OHalloran v. Rvan 835 F.2d 506, 508 (3d Cir. 1987).

Exhaustion is not a jurisdictional limitation, however, and federal courts may review the merits of a state prisoner's claims prior to exhaustion when no appropriate state remedy exists. Christy v. Horn 115 F.3d 201, 206 (3d Cir. 1997); Doctor , 96 F.3d. at 68 1; Carter v. Vaughn 62 F,3d 591, 594 (3d Cir. 1995). A petitioner shall not be deemed to have exhausted state remedies if he has the fight to raise his claims by any available state procedure. 28 U.S. C. § 2254(c). Federal courts may entertain the merits of a petition for habeas corpus where state remedies have not been exhausted "when no appropriate remedy exists at the state level or when the state process would frustrate the use of an available remedy." Story, 26 F.3d at 405; Hankins v.Fulcome , 941 F.2d 246, 249 (3d Cir. 1991). If the "petitioner has no opportunity to obtain redress in state court or where the state corrective process is so defective as to render any effort to obtain relief futile," exhaustion is not required. Gibson v. Scheidemantel. 805 F.2d 135, 138 (3d Cir. 1986) citing Duckworth v. Serrano, 454 U.S. 1, 3 (198 1). *See also* Hankins, 941 F.2d at 249-250 (exhaustion is excused if state process offers no hope of relief). Additionally, where "state officials have interfered with a habeas petitioner's utilization of state remedies," exhaustion is not required. Mayberry v. Petsock, 821 F. 2d 179, 184 (3 d Cir), cert. denied, 484 U. S. 946

"Inexcusable or inordinate delay by the state in processing claims for relief may render the state remedy effectively unavailable" and exhaustion will be excused. Woitczak 800 F.2d at 354 (exhaustion excused where state court delayed 33 months in deciding post-conviction petition)- Codispote v. Howard, 589 F.2d 135 (3d Cir. 1978).

This Court's initial inquiry regarding the exhaustion requirement is whether Petitioner has "fairly presented" his federal claims to the state courts- To meet the fair presentation criterion, the same factual and legal bases for a claim must be presented to the state court to allow the state a reasonable opportunity to address the claim and correct any violation of federal rights. Duncan v. Henry 513 U.S. 364 (1995)(per curiam). "Fair presentation requires that, before a particular is claim may be asserted in federal court, the same method of analysis must have been made available to the state court." Chaussard v. Fulcomer, 816 F.2d 925, 928 (3d Cir.), *cert. denied,* **484 U.S. 845** (1987).

The second criterion of the exhaustion requirement requires a petitioner to properly present his claims to the requisite state courts. A petitioner must present every claim raised in the federal petition to the state's trial court, intermediate appellate court and highest court before exhaustion will be considered satisfied. O'Sullivan v. Boerckel - U.S. 119 S.Ct. 1730 (1999)(". . . the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas (corpus] petition."); Orban v.Yau 1, 123 F. 3 d 727 (3 d Cir. 1997), *cert. denied,* 118 S. Ct. 717 (1998); Doctor 96 F. 3 d at 678; Evans v. Court of Common Pleas,

Delaware County. 959 F.2d 1227, 1230 (3d Cir. 1992), *cert denied, 506 U.S. 1089* (1993).

Petitioner requests that this Court waive the exhaustion requirement in this 1 matter. *See* Document # 20. Respondent claims that "it appears that Sontag has exhausted all of 2 his state remedies because he has filed an appeal to the Superior Court of Pennsylvania and, in 3 turn, appealed to the Supreme Court of Pennsylvania. Therefore, he has exhausted all of his state 4 remedies." Document 9 6, unnumbered page 6. In the Response to the Amended Petition, Respondent concedes that Petitioner has exhausted his state remedies concerning the denial of his motion to withdrawal his plea, recusal of the trial judge, and the excessive sentence issue. Respondent further states "Since the amended argument touches upon so many issues without raising specific challenges, it is difficult to determine whether exhaustion has been met... [f]or example, any issues challenging pre-trial rulings, ineffective assistance of counsel, and even the 9 voluntariness of the plea were never raise [sic] in the state court." Document # 13, unnumbered page 6.

Petitioner has exhausted only the three original issues. All of the other issues which Petitioner raises in his amended petition (refusal of the court to allow the withdrawal of the plea, due process, malicious prosecution, prosecutorial misconduct, involuntariness of plea, and ineffective assistance of counsel) have not been presented to A" state court. So the instant petition contains both exhausted and unexhausted claims. When a habeas corpus petition contains both exhausted and unexhausted claims, ordinarily the entire petition must be dismissed without prejudice

as a mixed petition, Rose v. Lundy, 455 U.S. *509 (1982);* Lambert v. Blackwell, 134 F.3d *506* (3d Cir. 1998); Banks v. Horn, 126 F.3d 206 (3d Cir. *1997);* Christy v. Horn, 115 F. 3 it 201 (3 d Cir. 1997). Federal case law is clear that state courts must have the first opportunity to address and correct violations of state prisoners' federal rights. O'Sullivan__U.S. at 119 S.Ct. at 1730; Rose, 455 U.S. at *518;* Preiser, 411 U.S. at 491,

However, a petition may be denied on the merits, notwithstanding a petitioner's failure to exhaust. Lambert v. Blackwell, 134 F.3d *506, 511-19* (3d Cir. *1997);* Hoxsie v. Kerby 108 F.3d 1239, 1242-43 (10th Cir. *1997)* ("The AEDPA ..codifies the holding in [Granbeay v. Greg, 481 U.S. 129 (1987),] by authorizing the denial of a petition on the merits despite failure to exhaust state remedies. Because § *2254(b)(2),* standing alone, does not contain the standard for determining when a court should dismiss a petition on the merits instead of insisting on complete exhaustion, we read § 2254(b)(2) in conjunction with Granbe!1y. The Supreme Court in Granberry reasoned that 'if the court of appeals is convinced that the petition has no merit, a 2 belated application of the exhaustion rule might simply require useless litigation in the state 3 courts.' Granberry 481 U.S. at BY). Therefore, this Court will address the merits of all of 4 Petitioner's claims (both exhausted and unexhausted).

## E. Petitioner's Claims

### 1. Right to Trial by Jury

In his original petition, Petitioner generally avers that his "right to a fair trial by my peers" has been violated. Document 9 3, unnumbered page 4. In his amended petition, Petitioner makes some general averments regarding due process.[4]

Article III, Section 2 of the Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury and the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury.... The right to be tried by a jury in criminal cases means the right to have a jury determine whether the defendant has been proved guilty of the crime charged." Neder v. United State, U. S. 119 S.Ct. 1827, 1844 (1999).

Under Pennsylvania law, a no contest plea is equivalent to a guilty plea. Commonwealth v. Boatwright 404 Pa, Super. 75, 590 A.2d 15, 19 (1991) citing Commonwealth v. Jackson, 376 Pa.Super. 433, 546 A.2d 105, 107 (1988). In federal

[4]Petitioner correctly states "The Due Process Clause requires the government to prove beyond a reasonable doubt every element of the crime with which defendant is charged. If the government fails to sustain its burden of proof on any element, the defendant must be acquitted." Document # 12, unnumbered page 2. However, when a defendant pleads no contest or guilty, the defendant is effectively accepting the weight of the evidence against him and the prosecution is relieved of its burden to prove every element of the crime charged,
jurisprudence, by pleading guilty, a criminal

defendant waives all constitutional claims antecedent to the plea except its voluntariness. McMann v. Richardson 397 U.S. 759, 774 (1970); Tollet v. Henderson, 411 U.S. 258, 267 (1973); Siers v. Ryan-. 773 F.2d 37 (3d Cir. *1985). See also* TMIor v. Whitle 933 F.2d 325 (5th Cir. 1991), cert. *denied,* 503 U.S. 988 (1992).

In considering the circumstances under which withdrawal of a guilty plea before imposition of sentence should be permitted, federal courts have held that motions to withdraw guilty pleas (made prior to sentencing) should be liberally construed in favor of the accused and should be granted freely. United States v. Young, 424 F.2d 1276, 1279 (3d Cir. 1970), However, there is no absolute right to withdraw a guilty plea and the acceptance or denial of the motion to withdraw a plea is wholly within the discretion of the trial court. Government of the Virgin Islands v. Berry, *631* F.2d 214, 219-20 (3d Cir. 1980) citing United States v. Stayton, 408 F.2d 559, 560-61 (3d Cir. 1969)("This does not mean that every motion for withdrawal before sentence should be granted. There is no absolute right to withdraw a guilty plea, and the fight to do so is within the sound discretion of the trial court."); United States v. Vallejo, 476 F.2d 667, *669* (3d Cir. 1973).

In order to ascertain and assure that the plea was knowing, voluntary, and intelligent, the trial court conducted a complete colloquy at the time of Petitioner's no contest plea. State Court Record, Transcript of Plea Colloquy. Relevant parts are excerpted here:
MR. PICCIN1M: Mr. Sontag, it's the Commonwealth's understanding that you intend to enter a plea in this matter this morning. Prior to entering a plea

there are certain important rights you need to be aware of. You are not required to enter a plea of no contest or in this case, and you have every right to take this case to trial, as you are aware. By entering your plea of guilty you waive - or **your plea of no contest you waive** or give up your right to have a trial by jury in this case. As you are aware, you have the right to select a jury of twelve people from the community to sit in judgment of your innocence or guilt. Prior to entry of your plea you need to be aware that the Commonwealth will have to prove your guilt beyond a reasonable trial and that the verdict of that jury would have to be unanimous. Do you understand those rights, Mr. Sontag?
THE DEFENDANT: Yes.

MR. PICCININI: It is the Commonwealth's understanding that you're going to enter a plea of no contest this morning. Is that your intention?

THE DEFENDANT: Yes.

MR. PICCININI: And do you also understand that by entering a plea of no contest that you subject yourself to the Court for purposes of sentencing in this case?

THE DEFENDANT: Yes.

MR. PICCININI: Do you understand that as well? I'm going to show you this document which your attorney has gone over with you entitled Defendant's Statement of Understanding of Rights Prior to Guilty or No Contest Plea. I will cross out the word guilty and circle the words no contest in light of your

anticipated plea in this case. Now, paragraph four of this document indicates that you will plead no contest to counts -- excuse me. Paragraph four indicates that the penalty that you will face for Counts 1, 2, 3, 4, 5, 6 and 7 is a $10,000.00 fine and 5 years in jail for each count.

THE DEFENDANT: Yes.

MR. PICCININI: At the bottom of this document above the word defendant is a signature which purports to be yours. Did you sign this document?

THE DEFENDANT: Yes.

MR. PICCININI: Do you have any questions concerning the contents of this document?

THE DEFENDANT: Not that's relevant.

MR. PICCININI: Okay. The -- well, this is –

MR. RIDGE: I'm sorry, what did you say?

THE DEFENDANT: Not that's relevant.

MR. RIDGE: Okay.

MR. PICCININI: I guess if I could be more specific in my question. This document sets forth all of the rights I explained to you, sets forth the maximum penalty, sets forth the plea agreement. Do you understand your rights?

THE DEFENDANT: Yes.

MR. PICCININI: Do you understand the maximum penalty?

THE DEFENDANT: Yes.

MR. PICCININI: And do you understand the plea agreement that you've entered into with the Commonwealth?

THE DEFENDANT: Yes.

MR. PICCININI: And you have signed this document?

THE DEFENDANT: (Nods head.)

MR. RIDGE: Your Honor, thank you. Again, my client had questions as to the nature of the no contest plea and not admitting his guilt as to the factual circumstances, but certainly understanding the Commonwealth's evidence in this case and that he could be convicted of these charges.

THE COURT: Mr. Sontag, just to tell you what has to be, before I can accept the plea I have to find a number of things. First of all, I have to make sure that you're entering the plea knowingly, voluntarily and intelligently. Part of what that means is I have to be satisfied that you understand those rights that you give up when you plead no contest, the maximum penalty that you may face, and any recommendations that the government of the Commonwealth may have made. In addition to that, we have to have on the record what they call a factual basis for the plea or at least they have to establish that the Commonwealth explains to you what are those things they have to prove beyond a reasonable doubt and if they went to trial what they would be introducing in

terms of the facts of their case. That's why when Mr. Piccinini breaks this into two sections, he's breaking down for you what the law requires him to prove as far as the elements of the offenses and then he goes into the facts. This could be the event which he's asserting would be presented at trial. Then in entering a no contest plea what you are saying basically is that you have no defense to the charge or you are wishing to offer no defense to the charge as alleged. So do you understand all that so far?

THE DEFENDANT: Yes.

THE COURT: Okay. So if you would listen now to Mr. Piccinini, he is now explaining to you what the legal definitions of the crimes are and then what the Commonwealth would intend to prove if this case went to trial. Then at the conclusion of each one he will ask you whether or not you are entering a no contest plea to that charge. So do you understand that?

THE DEFENDANT: Yes.

9MR. PICCININI: Mr. Sontag, I have a few further questions for you. Are your plea in this case voluntarily?

THE DEFENDANT: Yes.

MR. PICCININI: Has anybody forced you or given you any promises other than those things which are indicated in the plea agreement in this case that have caused you to enter your plea?

THE DEFENDANT: No one here, no.

MR. PICCININI: Mr. Sontag, this point needs to be very clear. Through your plea you've indicated that you accept the strength of the Commonwealth's case. And on the record, in this case the Commonwealth has provided all of the discoverable materials. There has been a **preliminary hearing, you've** heard the statements from the child victim at the preliminary hearing, you've been provided with all of the evidence that is relevant in this case that has been provided through the discovery process. Your plea of no contest indicates that you accept the strength of that evidence; is that correct?

THE DEFENDANT: Yes.

MR. PICCININI: Are you entering this plea of no contest voluntarily?

THE DEFENDANT: Yes.

MR. PICCININI: Are you being forced or coerced in any fashion to enter this plea other than your acceptance of the strength

**THE DEFENDANT: Other than the system?**

MR. PICCININI: Mr. Sontag, this is your opportunity to enter your plea or not enter your plea.

THE COURT: Mr. Piccinini, if you wish, at this point I would be more than happy to, pick up here

MR. PICCININI: Thank you, Your Honor,

THE COURT: -- at this juncture'. Okay, Mr. Sontag, I have reviewed the matters of record

today. I would also place on the record that a jury has been selected, that you participated in the selection of the jury panel with your attorney, and that that jury has been both empaneled and sworn and is prepared to hear testimony in this case. Basically I think there's been a very lengthy discussion between the Assistant District Attorney and you concerning those rights you give up, the definitions of the charges, what the facts would show, the maximum penalties, and the -- at least the recommendations for concurrent time, and my understanding is you understand all that so far, correct?

THE DEFENDANT: Yes.

THE COURT: And you understand, sir, that in pleading no contest that you are admitting basically that you're not challenging the strength of the Commonwealth's case and you're wishing to offer no defense. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: The question he was asking you, and this is the question that I'm asking you, has anyone made any promises to you, threats to you

THE DEFENDANT: Oh.

THE COURT: -- or forced you in any way to enter your plea of no contest here today?

THE DEFENDANT: No.

THE COURT: Whether you feel the system is fair or not is really not at issue.

THE DEFENDANT: Okay.

THE COURT: You have a right to go to trial or a right to plea. You've indicated you want to plead no contest, and I want to make sure that no one has forced you to do that.

THE DEFENDANT: No one has forced me.

THE COURT: And that you're doing this of your own free will and accord?

THE DEFENDANT: Yes.

THE COURT: Okay. Now, the other thing I want to tell you is this: Once I accept your plea there will be a finding of no contest plea entered and then YOU will proceed to sentencing. There's been a sentencing recommendation here that certain of the courts 4,5,6 and 7, be served concurrently, or the same time, with any sentence given on the other counts. So do you understand that?

THE DEFENDANT: (Nods head).

THE COURT: Well, I'm not going to -- are you -- are you suggesting that he's then going to have an automatic right to withdraw his plea?
MR. RIDGE: I'm sorry, I didn't mean to suggest that, but he has an automatic right at that point in time to file a motion.

THE COURT: Oh, absolutely he can request a motion. But the fact that they've recommended concurrent time, if concurrent time is not given to you, doesn't mean that the judge must allow you to withdraw your plea. Do you understand that?

THE DEFENDANT: (Nods head.)

THE COURT: Based upon my review of the matters of record, my observations of Mr. Sontag, and the other matters that we've covered this morning, based upon my observations of him yesterday when we were before the jury, I find that the plea in this case has been knowingly, voluntarily and intelligently entered and I will enter a plea of no contest to the charges at this time and I will sign the plea sheet which has been executed by all the parties and has been explained to Mr. Sontag.

Id. at pages 3 - 20,

Petitioner's claim that his right to trial by jury was violated is without merit. Petitioner pled no contest to the crimes charged, thereby waiving his right to a jury trial. The transcript of the plea colloquy taken by the trial court is clear that Petitioner understood his rights and voluntarily waived them.

2. Recusal of Judge

In his original petition, Petitioner generally avers, without stating specific reasons, that Judge DiSantis should have recused himself For purposes of analysis, this Court assumes that this claim is the same claim Petitioner has raised through the state courts on *his* direct appeal; i.e., "Whether the court erred in refusing to recuse itself from the sentencing proceeding. The failure to recuse was an abuse of discretion since the court had made pre-sentencing determination as to *the* appellant and the complainant?" In his amended petition, Petitioner states I now started worrying about why Judge DiSantis failed to

grant [the motion to withdraw the no contest-plea] -- then it hits me, the alleged victim, Kathryn, has an uncle on the Erie Police Force that went to school with Judge DiSantis, at Cathedral Prep and the Uncle's name is Dave Grassi, the alleged victim's father's brother. I had 23 character letters presented to Judge DiSantis which proved beyond a reasonable doubt that Kathryn was lying and they made no dent at the sentencing. After all this the Judge DiSantis sentences me in the aggravated range and I get 3 to 6 years state time.

Document # 12, unnumbered page 5. Petitioner makes no averments on this issue in the proposed second amendment to the petition. There is evidence in the state court record that Judge DiSantis recognized Petitioner as a high school classmate.[5]

[5]In the hearing on the motion to withdraw the no contest plea, Judge DiSantis stated on the record "Just so the record is clear that I sent each counsel a letter. I realized during the plea colloquy that the defendant and I were high school classmates, and (continued...)

The due process fight to a fair trial includes the right to an unbiased judge. The issue is not simply misconduct by the judge; rather, there must be a showing of actual bias. Liteky v. United States, 510 U.S. 540, 555-56 (1994). Petitioner has failed to demonstrate actual bias. The Pennsylvania Superior Court determined that the trial judge did not abuse his discretion when he denied-the motion to recuse because Petitioner could not demonstrate any bias or partiality (as his

sentence was amply supported by the record). The court recognized that, unlike the present situation, recusal is warranted when a guilty plea is withdrawn and the same judge is scheduled to serve as the trier of fact in a subsequent trial. The Superior Court quoted extensively from the transcript at the motion to recuse hearing:

> With respect to the arguments raised by counsel, and recognizing that it is the burden of proof upon the defense to show that this Court recused, I gave this a good deal of thought. I gave it a good deal of thought not only yesterday but last night and this morning. And the key question I have to ask myself is by the mere fact that I went school with [Petitioner], I think that fact, do I feel somehow impaired that I cannot be objective in terms of my decision in this case, And having gone through that

although I didn't feel that necessarily impaired my ability to decide this issue, I wanted to at least alert counsel to that fact in case it presented any problems for counsel, and it doesn't. So, once again, thank you, counsel." State Court Record March 4, 1996, hearing, page18.

> analysis I believe the answer *is* I can be objective in weighing all the aspects of the sentencing code which include not only the nature of the offense and the impact of the victim or society, but also his rehabilitative needs and his background. The next question have to ask myself is the any [sic] appearance of impropriety if I

> proceed, is how the justice system would be tarnished if I proceed to sentencing. And I don't believe it is. I believe I can go ahead. With respect to the interpretation about credibility, have I made some sort of judgment, or have I made some sort of prejudgment, I think [the district attorney] interpreted it the way I meant it. My analysis when I dealt with the withdraw (sic] of the plea was I was trying to go through the factors to determine whether a fair and just reason had been stated, and where there substantial prejudice to the Commonwealth that outweighed that. And that was my finding to the extent I discussed credibility really was in the context of whether the plea was *knowingly, voluntarily, i*ntelligently made. Having considered the argument of counsel, having considered all these facts quite carefully, it is my opinion that I can proceed in this case and that I can proceed objectively and meet [sic] out a sentence which I think takes into all those considerations which I must consider. Having said that then I will deny the order of motion for recusal. It is preserved for the record.

State Court Record, Superior Court Opinion, direct appeal, page 24-25.

It is a well-settled principle that there is a presumption of correctness in full and fair state hearing. Reese v. Fulcomer 946 F.2d 247 (3d Cir. 1991). Hence, when a petitioner has been afforded a full and fair opportunity to have his case heard, the facts adduced by those courts are presumed to be correct and the petitioner is not entitled to habeas corpus

relief The United States Court of Appeals for the Third Circuit has explained:

> the writ of habeas corpus is available only to persons held 'in custody in violation of the Constitution or laws or treaties of the United States. 28 U,S.C. § 2254(a). As stated by the Supreme Court, federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimensions.

Smith v. Zimmerman, 768 F.2d 69, 71 (3d Cir. 1985)(internalmal citations omitted). *See* Geshwendt v. Ryan, 967 F.2d 877, 899 *(en banc)* (3d Cir. 1992), *quoting* Estelle v. McGuire, 502 U.S. 65 (199 1) ("Today we reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). A statutory presumption of correctness applies to state-court findings of fact, but not to mixed fact/law determinations. Townsend v. Sain, 372 U.S. 293 (1963); Keeney v. Tamayo-Reyes, 501 U.S. I (1992)." This Court finds that the state court presumption of correctness applies here.

Excessive Sentence

In his original petition, Petitioner generally raises the issue of "excessive punishment," without reference to what aspects of *his* sentence are excessive. In neither *his* amended petition 2 nor his proposed second amendment to the petition, does Petitioner make any claims regarding 3 his sentence.

The Eighth Amendment prohibits grossly excessive punishment. Rummel v. Estelle, 445U.S. 263, 291 (1980); Furman v. Georgia 408 U.S. 238, 280 (1972). Alleged defects in the state court's sentencing procedure constitute state law claims and do not provide a ground for federal habeas corpus relief. Pringle v. Court of Common Pleas, 744 F.2d 297, 300 (3d Cir. 1984). The application of state law results in a violation of due process only if the sentence is arbitrary and capricious. *See* Richmond v. Lewis, 506 U.S. 40, 50 (1992). Petitioner was sentenced within the sentencing guideline ranges on all counts. When considering Petitioner's direct appeal, the Pennsylvania Superior Court stated that "Where, as in his case, the sentences imposed are within the statutory limits, a claim of excessiveness does not raise a substantial question. Commonwealth v. Breter, 425 Pa. 248, 624 A.2d 661, 662 *(1993)." See* State Court Record. After a thorough analysis, the appellate court found that the trial court adequately supported its sentence within the aggravated range. Because Petitioner's sentence was within the statutory framework, it cannot be arbitrary and capricious and cannot provide Petitioner with federal habeas corpus relief.

**4. Malicious Prosecution**

In his amended petition, Petitioner makes several broad assertions of malicious prosecution. *See* Document # 12. This issue has not been raised in any state court and, therefore , has not been exhausted.

There is no federal common law right against malicious prosecution. Business Guides.Inc. v. Chromatic Communications

Enterprises, Inc., 498 U.S. 533, 553 (1991). Malicious prosecution is a tort recognized by the common law, of many states, including Pennsylvania. Huge v. Pennsylvania R. Co., 101 A.2d 740, 376 Pa. 286 (1954). The tort of malicious prosecution is codified in Pennsylvania law at 42 Pa.C. S.A. § 8351. Violations of state law are not sufficient to establish jurisdiction within the federal courts. Engle, 456 U.S. 107; Wells, 941 F.2d 253. A petitioner must allege a deprivation of a federal right before habeas relief can be I granted. Id. Because malicious prosecution is strictly a matter of state law7, Petitioner's claim of malicious prosecution is not cognizable in federal habeas corpus proceedings.

5. **Ineffective assistance of counsel**

In his amended petition, Petitioner makes indirect allegations of ineffective assistance of trial counsel! In his proposed second amendment to the petition, Petitioner makes more Even in a state court, Petitioner would find it difficult to raise a claim of malicious prosecution. In Heck v. Humprhey , 512 U.S. 477 (1994), the U.S. Supreme Court thoroughly examined the common law tort of malicious prosecution (as analogous to § 1983 claims);

> ....a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society. One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. This

> requirement avoids parallel litigation over the issues of probable cause and guilt ... and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. Furthermore, to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit.

Id. at 484. In order to recover under the statutory cause of action for malicious prosecution in the Commonwealth of Pennsylvania, it must be shown that the underlying proceeding terminated favorably for plaintiff that defendant caused those proceedings to be instituted without probable cause, and that defendant acted with malice. Shaffer v. St 326 Pa.Super. 135, 473 A.2d 1017 (1984); 42 Pa.C.S.A. § 8351.

In that the underlying criminal proceeding has not terminated favorably for Petitioner due to his plea of no contest, it appears that Petitioner could not prevail in a malicious prosecution proceeding. Specific allegations of ineffective assistance of counsel of David Ridge, Esq., both at trial and on direct appeal. Petitioner specifically alleges that hewas unconstitutionally coerced, intimidated, decepted [sic] or tricked into entering a no contest plea (the same as a guilty plea)..." Proposed Second Amendment to the Petition, undocketed, page 9. Petitioner claims that Attorney Ridge failed to exhaust all potential defense strategies and investigative

leads. Petitioner further alleges that Attorney Ridge told [him] in a threatening and coercive manner that 'If you enter this plea, the sentence would consist of a county

[8]my attorney Dave Ridge, said he was up all night working on a new way to address the eleven woman one man jury. My attorney was obviously overtired but he said he worked out a new deal that I would want to consider. He said he had found a legal loop hole that would allow me to plead no contest before the court today. This is the first time I had noticed any indications that he may have a problem of winning his case. He told me that he thought he could win it but if we lost I could get state time. He told me a no contest plea with no previous r record would get me county time but we could appeal and that I would be released on bond pending appeal.... Based on this misleading information I plead [sic] no contest.... [Later] I headed back to Erie and immediately hired an assistant counsel because of the advise [sic] of Houston counsel and I felt Dave Ridge had caused me to make a wrong decision and I felt extra counsel this time couldn't hurt." Document # 12, unnumbered pages 3-4.

sentence and I'll file an appeal and get you an appeal bond. "' Id. at 10. Petitioner avers that Attorney Ridge convinced him to plead no contest in exchange for a county sentence, when **in fact** there was no such agreement in place. Id. Petitioner also claims that on direct appeal Attorney Ridge was ineffective because he failed to argue to the appellate court his own ineffectiveness 1) for influencing

Petitioner's decision to enter the plea; 2) suppression of the evidence that would have a supported Petitioner's innocence and impeached the credibility of the complainant; and, 3) allowing precluded testimony by the child victim-witness to go uncorrected. Id. at 12-13. Neither the ineffective assistance of counsel at trial/plea or on direct appeal have been raised in any state court and, therefore, have not been exhausted.

The right to counsel and therefore the right to the effective assistance of counsel are guaranteed under federal law and are cognizable in federal habeas corpus proceedings. *See U.S.*Const. Amend. VI.; Strickland v. Washington, 466 U.S. 668 (1984); McMann 397 U.S. 759. However, ineffective assistance of counsel is cognizable only where there is a federal constitutional right to counsel; i.e., only through trial and the first appeal as of right. Coleman v.Thompson 501 U.S. 722,756-57(1991);PennsylvaniLy. Finley, 481 U.S. 551, 556(1987); Ross v. Moffitt, 417 U.S. 600, 616 (1974). Counsel's alleged deficient performance thereafter is not a basis for a federal habeas claim. *See* Wainwright v. Torna, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). The U.S. Supreme Court has declined to extend the right to counsel beyond the first appeal of a criminal conviction. ***Ross,*** 417 U.S. 600; Finley 481 U.S. 551; Murray v. Giarratano, 492 U.S.I (1989).

The standard "for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. If the fairness of

the judicial 8 process is not in question, then the Sixth Amendment right to counsel is not implicated. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). To establish ineffective assistance of counsel, two components must be shown. First, petitioner must demonstrate that counsel made errors of sufficient magnitude that the Sixth Amendment guarantee of counsel is implicated, which would require that counsel's errors call the trial's fairness into question. 5trickland, 466 U.S. at 686. Second, counsels' deficiencies must have prejudiced petitioner, by depriving him of a fair trial. Id. Petitioner must establish both deficiency in performance and prejudice. Strickland. 466 U.S.at 687; Dooley v. Petsock 846 F.2d 885, 889 (3d Cir. 1987).

To establish prejudice, the petitioner need not show counsel's errors more likely than not altered the outcome. Nix v. Whiteside 475 U.S. 157 (1986). "A reasonable probability is a probability sufficient to undermine confidence in the trial's outcome." Strickland 466 U.S. at 694; United States v. 878 F.2d 702 (3d Cir. 1989). The Strickland test applies to judging whether counsel was effective in the guilty plea process. Hill v. Lockhart 474 U.S. 52 (1985). In the context of a guilty plea, in order to satisfy the prejudice requirement, petitioner "must show that, but for counsel's errors, he would not have pleaded guilty **and would have insisted** on going to trial." Id. at 59; Miller v. Brennan, 1998 V & 666037 (E.D.Pa.). The Hill Court explained

> This inquiry will closely resemble the inquiry engaged in by courts 24reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of

> counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have held counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

474 U.S. at 59; Dooley v. Petsock 816 F.2d 885 (test for determining ineffective assistance of counsel is also applicable to habeas corpus petitioners who challenge effectiveness of counsel prejudice under Strickland, this Court must after entry of guilty plea). Additionally, in assessing consider the strength of the evidence against the defendant because "... a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Buehl v. Vaughn166 F.3d 163 (3d Cir. 1999), quo ting Strickland, 466 U.S. at 696.

Where, as here, the petitioner is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's 12 advice "was within the range of competence demanded of attorneys in criminal cases." McMann, 397 U.S. at 771. There is always a strong presumption that counsel's conduct was reasonable. Strickland, *466 U. S.* at *689*. "The evaluation of reasonableness must begin with a 'strong presumption that counsel's conduct falls within the wide range of

reasonable professional assistance."' Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425, 1430 (3d Cir. *1996), cert denied, U.S.*-117 S.Ct. 538, (1996) *quoting* -Strickland, 466 U.S. at 689. There is no one correct way to represent a client and counsel must have latitude to make tactical decisions. Lewis v. Mazurkiewicz 915 F.2d 106, 115 (3d Cir. 1990)("[W]hether or not some other strategy would have ultimately proved more successful, counsel's advice was reasonable and must therefore be sustained."); see also, Flamer v. Delaware, 68 Ford 710 (3d Cir. 1995)C'Defense counsel's waiver of closing argument in guilt phase of defendant's capital murder trial was not ineffective assistance of counsel, through decision to forgo closing statement may not have been wise. . ."). A petitioner is bound by his attorney's "strategic choices made after thorough investigation of law and facts relevant to plausible options." Strickland, *466* U.S. at 690, The United States Court of Appeals for the Third Circuit has held that the attorney client relationship is necessarily composed of two distinct areas; fundamental decisions and non fundamental decisions. Weatherwax,77 F.3d at 1433. The criminal defendant has the ultimate authority to make the fundamental decisions regarding his case, while counsel has the ultimate authority to make non-fundamental decisions.Id. Fundamental decisions have been defined by the U.S. Supreme Court as including to plead guilty, to waive the right to trial by jury, to testify in one's own behalf, to take an appeal, or to waive the right to counsel." Id. citing Jones v. Bames- 463 U.S. 745, 751 (1983) and Faretta v. California, 422 U.S. 806, 834 (1975).

Petitioner claims that Attorney Ridge failed to exhaust all potential defense strategies and investigative leads. Further, Petitioner avers that Attorney Ridge convinced him to plead no contest in exchange for a county sentence (which Petitioner did not receive). On direct appeal, Attorney Ridge was ineffective because he failed to argue to the appellate court his own ineffectiveness 1) for influencing Petitioner's decision to enter the plea; 2) suppression of the evidence that would have supported Petitioner's innocence and impeached the credibility of the complainant; and, 3) allowing perjured testimony by the child victim-witness to go uncorrected. Under the Strickland and Weatherwax standards, an attorney is not constitutionally required to "exhaust all potential defense strategies and investigative leads." Petitioner does not state specifically what strategies or leads Attorney Ridge was ineffective for not pursuing. Matters of Ridge's trial strategy will not form the basis for ineffective assistance of counsel. *See* Flamer, 68 F.3d 710; Lewis, 915 F-2d 106. Under Weatherwax, a decision to plead guilty or no contest is a fundamental decision **which must be made exclusively by the** criminal defendant. The attorney cannot make this important decision on behalf of the criminal defendant. *See McMann*, 397 U.S. at 770 "Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts."); Tollett, 411 U.S. at 267 ("[Just as it is not sufficient for the criminal defendant seeking to set aside such a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical

facts, it is likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.").

Here, Petitioner Sontag made the ultimate fundamental decision to enter a plea of no contest. To ensure that a criminal defendant has come to the plea decision of his own volition, a lengthy plea colloquy is conducted by the trial court. During his colloquy, Petitioner Sontag was asked several different ways, if his plea was voluntary, knowing and intelligently made. *See* infra, pages 12-18. Each time, Petitioner responded in the affirmative. As evidence of his own decision, Petitioner (and not his attorney) answered each question." Because the criminal defendant is ultimately responsible for the entering of a plea, trial counsel is not ineffective. If this Court finds no merit in petitioner's claims that his trial counsel provided ineffective assistance, appellate counsel cannot be found ineffective for failing to raise meritless issues on appeal. United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995) 'When a defendant alleges his 10 appellate counsel rendered ineffective assistance by failing to raise an issue on appeal, we examine the merits of the omitted issue. If the omitted issue is without merit, counsel's failure to raise it does not constitute constitutionally ineffective assistance of counsel.") In other words, if there is no ineffective assistance of counsel at the trial level for "influencing" the Petitioner's plea, there can be no ineffective assistance of counsel on appeal for failure to raise the same issue. *See* Jones v. Barnes, 463 U.S. at 754 (a criminal defendant has no constitutional right

to insist that appellate counsel advance every non-fiivolous argument the defendant wants raised);
Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir, 1996) (appellate counsel does not have a duty to raise every possible claim). Petitioner also claims that Attorney Ridge was ineffective on direct appeal for failing to raise as an appellate issue the suppression of the evidence that would have supported Petitioner's innocence and impeached the credibility of the complainant. The suppression of this evidence was made via an evidentiary ruling by the trial court. The evidence to which Petitioner refers is the evidence that the child victim had been involved in an alleged sexual assault and subsequent **rape counseling in March of 1987.** Petitioner further claims that Attorney Ridge was ineffective on direct appeal for failing to raise his own ineffectiveness at trial in allowing the perjured testimony by the victim at the preliminary hearing to go uncorrected. Again, the perjured testimony to which Petitioner refers is the testimony regarding the incident and subsequent counseling in March 1987. The evidence was excluded after an evidentiary determination made by the trial court. This Court need not examine the evidentiary ruling by the state trial court[1].[10] Evidentiary rules are state procedural rules, and, as such, even a violation of a state evidentiary rule cannot provide federal habeas corpus relief. *See* Engle, 456 U.S. 107 (violations of state law or procedural rules alone are not sufficient to provide habeas

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[1] **ref[10]The Commonwealth has failed to provide this Court with the documents relating to this evidentiary hearing.**

corpus relief); Wells, 941 F.2d 253. At the preliminary hearing, Attorney Ridge fully cross-examined the victim about the counseling following the March 1987 incident[1].[11] The victim admits that she was counseled, but

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[1] ref[1] [1]Pertinent portions of the preliminary hearing follow:

MR. RIDGE: Now, I don't want to know why, I'm not asking you why, but you had talked to some Rape Crisis counselors when you were younger even, didn't you?

VICTIM: They asked me -- well, my mom went to counseling.

MR. RIDGE: But I mean even before you talked to them recently.....

MR. PICCININI: Your Honor, this line of questioning is not relevant.

MR. RIDGE: Your Honor, I'm trying to very much limit the question. And if the court wants me to approach the bench, I'm not trying to get into any prior sexual conduct involving --

THE COURT: Why don't you approach the bench?

(Sidebar discussion held off the record.)

MR. RIDGE: When you were younger, you had to go talk to people from Rape Crisis. Do you remember talking to people from Rape Crisis when you were younger?

VICTIM: No.

[1]ref[11]MR. RIDGE: You never talked to anybody from Rape Crisis when you were about six or seven years old?

VICTIM: I remember going to a place by a post office.

MR. RIDGE: Do you remember talking to some counselor when you were younger?

VICTIM: Yes. But they never asked me about -- if I was ever sexually abused.

MR. RIDGE: I understand that. But you did talk to-- How old were you when you talked to that counselor, about?

VICTIM: I don't know.

MR. RIDGE: How about five, six or seven?

VICTIM: Older than that.

MR. RIDGE: Older than that?

VICTIM: Older than -- I was older than seven.

MR. RIDGE: Okay. And you told the Judge before that Frank was doing these things when you were five, six and seven and eight; right?

VICTIM: (Witness nods head.)

MR. RIDGE: Correct?

VICTIM: Yes.

claims that she did not mention the abuse by Sontag to the counselors due to her own embarrassment and the fact the counselors never asked her directly if Sontag were abusing her. Attorney Ridge exhausted this line of

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[1] ref[11]MR. RIDGE: You never told that counselor, though, that Frank was doing those things; right?

VICTIM: No.

MR. RIDGE: You didn't talk to that counselor at all about sex of any type?

VICTIM: No.

REDIRECT BY MR. PICCININI

MR. PICCININI: Katherine, you indicates some earlier time when you discussed or when you met with some counselors of some sort. Why, when you met those officials, did you not tell them about what Frank was doing to you?

VICTIM: I just didn't want to. I was - It"s embarrassing and humiliating. I didn't want to say anything. They asked me questions, and I just answered them.

MR. PICCININI: Were you questioned in relation to Frank specifically?

VICTIM: Uh-huh.

Transcript, pages 48 - 5 1.

questioning. Consequently, this Court cannot find ineffective assistance of counsel here. Again, if this Court finds no merit in petitioner's claims that his trial counsel provided ineffective assistance, appellate counsel cannot be found ineffective for failing to raise meritless issues on appeal. *See* Jones, 463 U.S. at 754; Sistrunk, 96 F.3d at, 670. Additionally, Petitioner accepted the Commonwealth's case against him, including the weight of all of the evidence, when he pled no contest to the charges, thereby waiving his right to contest the alleged perjured testimony by the victim. None of Petitioner's allegations regarding the ineffective assistance of counsel are sufficient to provide habeas corpus relief.

**6. Prosecutorial Misconduct**

Petitioner claims he was the victim of prosecutorial misconduct in that the Commonwealth did suppress or did not disclose material evidence that was favorable to the Petitioner. Proposed Second Amendment to the Petition, undocketed, page 13. The material evidence to which Petitioner refers is the allegedly perjured testimony of the child victim at the preliminary hearing denying that she had been counseled by the Rape Crisis Center following a March 1987 sexual assault by a group of young boys. Id. Petitioner claims that the Commonwealth knowingly presented this false testimony at the preliminary hearing. Id. at 14. Petitioner further claims that he wanted to use this evidence to impeach the credibility of the victim. Id. Evidence of the counseling following the incident was suppressed by the trial court. This issue has not been raised in any state **court and, therefore, has not been exhausted.** A

defendant's right to due process is implicated when the state obtains a conviction based upon testimony the state knows to be perjured Robinson v. Arvonio, 27 1 F.3d 877, 883 (3d Cir. *1994), vacated on other grounds,* 513 U.S. 1186, (1995) (citing Napue v. Illinois, 360 U.S. 264, 269 (1959) and Giglio v. United States, 405 U.S. 150, 153-55 (1972)). A conviction obtained through the use of false evidence violates the Fourteenth Amendment even when the state, although not soliciting false evidence, allows it to go uncorrected when it appears. Napue, 360 U.S. at 269. The state's knowing use of perjured testimony to obtain a conviction constitutes constitutional trial error. Robinson, 27 F.3d at 884. A bare allegation that a prosecution witness gave perjured testimony neither establishes a due process claim nor warrants an evidentiary hearing to be further explored. Koch v. Puckett, 907 F.2d 524, 531 (5th Cir. 1990). There must be an allegation of specific evidence that the prosecutor knew to be false. Even with more than a bare allegation of perjury, if the matter is fully explored before the jury, it is exclusively a matter for the jury. United States v. Gowen, 3 2 F.2d 1466, 1471 (1 Oth Cir. 1994), cert. *denied, 513* U.S. 1173 (1995). The petitioner must also show the materiality of the alleged perjured testimony, \.*e.*, that there was a reasonable likelihood that the false testimony could have affected the verdict. *See* United States v. Agurs, 427 U.S. 97, 103 (1976); Giglio v. United States, *405* U.S. 1507 154 (1972). In the present case, Petitioner Sontag cannot demonstrate with a reasonable likelihood that this evidence (of whether the complaining victim was the victim of a prior sexual assault and was subsequently counseled by the Rape Crisis Center) was

material to the criminal charges he faced- Petitioner has not shown that with the introduction of this evidence his jury trial would have resulted in an acquittal. Based on the suppression of this evidence (by evidentiary ruling of the trial court), Petitioner pled no contest thereby accepting the Commonwealth's case against him. The Sixth Amendment guarantees a criminal defendant the right to offer the testimony of 14 favorable witnesses and to have compulsory process for obtaining witnesses in his favor. The 15 U.S. Supreme Court has extended the compulsory process clause to cover a criminal defendant's 16 right to present witnesses or evidence in his defense. Government of the Virgin Islands v. Mills 17 956 F.2d 443 (3d Cir. 1992) (citing Taylor v. Illinois 484 U.S. 400, 409 (1988) and 18 Pennsylvania v. Ritchie, 480 U.S. at 56). The compulsory process clause protects the 19 presentation of the defendant's case from unwarranted interference by the government, be it in 20 the form of an unnecessary evidentiary rule, a prosecutor's misconduct, or an arbitrary ruling by the trial judge. **Mills,** 956 F.2d at 445. But the right is not absolute. The Sixth Amendment 21 requires more than a mere showing by the accused that some relevant evidence was excluded 22 from his trial; rather, the accused must show how that testimony would have been both material 23 and favorable to his defense. Id. at 446. Thus, to establish a violation of the Sixth Amendment 24 right to compulsory process, a petitioner must show: 1) that he was deprived of the opportunity to present evidence in his favor, 2) that the excluded testimony would have been material and favorable to his defense; and 3) that the deprivation was arbitrary or disproportionate to any legitimate evidentiary

or procedural purpose. Id citing Rock v. Arkansas 483 U.S. 44, 56

(1987). Because Sontag pled no contest, he waived his right to present evidence on his behalf Petitioner claims that the Commonwealth has violated Brady v. Maryland 373 U.S. 83, 87 (1963), by failing to disclose the evidence of the victim's prior rape counseling. Petitioner misunderstands the holding in Brady, In Brady, the U.S. Supreme Court concluded that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith by the prosecution." Id, accord Kyles v. Whitley, 514 U.S. 419 (1995). *See also* United States v. Valenzuela-Bemal, 458 U.S. 858, 867 (1982)(evidence is material only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact); United States v. Bagley, 473 U- S. 667, 682 (1982)(a reasonable probability is a probability sufficient to undermine confidence in the outcome); Kyles v. Whitley,5 14 U. S. 419, 43 5 (1995)(Brady claim sustained by showing that favorable evidence withheld could reasonably be taken to put whole case in such a different light as to undermine confidence in verdict); United States v. Agurs, 427 U.S. 97, 109-10 (1975)("the mere possibility that an item 14 of undisclosed information might have helped the defense or might have affected the outcome of trial does not establish 'materiality' in the constitutional sense!'). To demonstrate a Brady violation, a defendant must show that evidence was suppressed, that it was favorable to him , and that it was material to guilt or punishment.

Walker v. Lockhart, 763 F.2d 942, 947 (8th Cir.), *cert. denied,* 478 U.S. 1020 (1986). However, the suppression of evidence to which the Brady Court refers is the nondisclosure of exculpatory evidence to defense counsel, not, as is the case here, the exclusion of evidence at trial by way of an evidentiary ruling by the trial court. The exclusion of evidence at trial based on a evidentiary ruling is a state court matter and cannot provide federal habeas corpus relief. Story v. Kindt 970 F. Supp. 435 (W,D. Pa. 1997). *See* Engle v. Isaac 456 U.S. 107; Wells v. Petsock, 941 F.2d 253. Although Petitioner's multiple pleadings contain pages and pages of broad accusations of prosecutorial misconduct, none of Petitioner's claims can provide habeas corpus relief for him. Futility of new amendments because of non-exhaustion Petitioner has filed a second motion to amend his petition. Document17. Petitioner seeks to raise the additional claims of prosecutorial misconduct by Assistant District Attorney Piccinini, malicious prosecution, and ineffective assistance of counsel at trial and on appeal. Petitioner's amendments are futile and should be denied. The United States Court of Appeals for the Third Circuit has determined that "futility" means that the complaint, as amended, would fail to state a claim upon which relief could be granted. In re Burlington Coat Factory Securities Litigation. 114 F.3d 1410, 1434 (3d Cir. 1997) citing Glassman v. Computervision Corp., 90 F. 3d 617, 623 (1 st Cir. 1996) *citing* 3 Moore's Federal Practice § 15.08[4], at 15-80 (2d ed. 1993). In this case, whether or not the motion to amend is granted, the result is the same. Although Petitioner has failed to exhaust the issues of the first amended petition and he has failed to exhaust the issues in the proposed second amended

petition, this '0 Court has fully examined the merits of all of Petitioner's claims and hereby respectfully 11 recommends that the instant petition be denied.

G. Certificate of Appealability

Section 102 of the Antiterrorism Act (28 U.S.C. 2253(c) (as amended)) codified standards governing the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition. Amended Section 2253 provides that "[a] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." The instant petition contains both exhausted and unexhausted claims and does not present any valid issue for appeal. Accordingly, a certificate of appealability should be denied.

## III. CONCLUSION

For the. foregoing reason, this Court recommends that the *Petition for Writ of Habeas* Corpus be denied and that a certificate of appealability be denied. Petitioner's Motion to Amend the Petition [Document # 17] should be denied as futile. Petitioner's Motion that State Exhaustion Requirement be Waived [Document # 20] should be denied. By separate order this same day, Petitioner's Motion for Judgment on the Pleadings [Document 9 21] is granted and Petitioner's Motion for Intervention [Document 9 23] is dismissed as moot.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Local Rule 72.1.4B, the parties are allowed ten (10) days from the date of service to file written 2

objections to this report. Any party opposing the objections shall have seven (7) days from the 3 date of service of objections to respond thereto. Failure to timely file objections may constitute a 4 waiver of any appellate rights.

s/Susan Paridise Baxter

SUSAN PARADISE BAXTER

United States Magistrate Judge

Dated: August 19, 1999

cc: The Honorable Sean J. McLaughlin
United States District Judge
All parties of record_____

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

FRANK SONTAG
Petitioner C.A. No. 97-349 Erie

V.

NEAL MECHLING
Respondent

MEMORANDUM ORDER

This petition for writ of habeas corpus was received by the Clerk of Court on October 31, 1997, and was referred to United States Magistrate Judge Susan Paradise Baxter for or report and recommendation in accordance with the Magistrates Act, 28 U.S.C. 636 (b) (1) and Rules 72 .1.3 and 72. 1,4 of the Local Rules for Magistrates.

The magistrate judge's report and recommendation, filed on August 19, 1999, recommended that the petition for writ of habeas corpus be denied, and that a certificate of appealability be denied. The report further recommended that the Petitioner's Motion to Amend Petition (Doc. #17) should be denied as futile, and Petitioner's Motion that State Exhaustion Requirement be Waived (Doc. #20) should be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on Petitioner by certified mail at SCI Waynesburg, where he is incarcerated, and on Respondent. objections were filed by Petitioner on September 13, 1999. After de novo review of the petition and documents in the case, together with the report

and recommendation and objections thereto, the following order is entered:

AND NOW, this 'Day of September, 1999;

IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus is DENIED, and that a certificate of appealability is DENIED. It is further ORDERED that Petitioner's Motion to Amend the Petition (Doc. #17) is DENIED as futile, and Petitioner's Motion that State Exhaustion Requirement be waived (Doc. #20) is DENIED. It is further ORDERED that the Clerk of Court is directed to file the amended petition.

The report and recommendation of Magistrate Judge Baxter, dated August 19, 1999, is adopted as the opinion of the court.

s/ Sean J McLaughlin
Sean J McLAUGHLIN
United States District Judge

CC: all parties of record TH

**APPENDIX SUB (B)**

WILLIAM J. HATHAWAY, Esq.

ATTORNEY AT LAW
*824 HILBORN* AVENUE, SUITE I
ERIE, PENNSYLVANIA 16505
(814) 464-9500
FAX. (814) 464-9502

June 22, 2005

Frank J. Sontag
3908 Perry Street
Erie, PA 16504

Re.-Commonwealth of PA v. Frank J. Sontag
No. 1339 of 1995

Dear Mr. Sontag-.

You retained me for the purpose of reviewing your case file at the Erie County Clerk of Courts Office to determine whether a Motion in Limine filed by the Commonwealth of Pennsylvania and court order granting that Motion could be located within the case file. The Motion in Limine was in regard to the Commonwealth's effort to exclude certain evidence of an alleged sexual assault against the child victim by a group of young boys and the subsequent rape counseling engaged in by the child victim. Magistrate Judge Susan Paradise Baxter referenced said Motion in Limine and the court order granting the motion in the Magistrate Judge's Report and Recommendation filed in response to your Petition for Habeas Corpus filed at C.A. No. 97-349 Erie.

On June 20, 2005, I requested the Clerk of Courts to obtain your case file from the courthouse warehouse for purposes of my review. The Clerk of Courts Office complied with my request and permitted me access to the file, which I reviewed in its entirety on June 21, 2005. I now write for the purpose of advising you that I did not find any evidence within the case file of the Motion in Limine at issue or any court order granting said motion. I have enclosed a summary document, which is prepared by the Clerk of Courts office when a case is on appeal setting forth the contents of the case record being forwarded to the Superior Court of Pennsylvania. You will note that this summary was prepared in regard to the appeal taken from the denial of your PCRA Petition. There are 57 items documented in the file and the Motion in Limine is not included. Moreover, my review of the contents of the case file indicated that this summary is consistent with the case file.

In addition, I did locate the discovery request filed by your former counsel, Attorney Dave Ridge, which I have enclosed herein. You will note that in the discovery request Attorney Ridge sought records from the Office of Children and Youth in regard to the alleged child victim's interviews by that agency relative to the allegations of the instant case. However, there was no ostensible reference to the other allegations regarding the rape of the child victim by the group of boys and her counseling arising from that incident. Judge Domitrovich granted a Rule to Show Cause and then denied the discovery request based upon a finding that the Commonwealth had provided all mandated discovery.

Therefore, in regard to your directive to me, I can state my findings that I did not locate any evidence of record as to the Motion in Limine referenced by Judge Baxter. Please let me know if you require any further clarification as to my investigation of the case file or if you want me to proceed with any further investigation.

Very truly yours,

s/William J. Hathaway
William J. Hathaway

Enclosures

**APPENDIX SUB (C)**

**MILLCREEK TOWNSHIP POLICE DEPARTMENT**

Juvenile Division

Complaint 949

Incident **87-565-10**

**Kathryn Stevenson Boyd D.O.B. 2/1/82**
NAME MIDDLE LAST

713 East Grandview LITTLE U DAY CARE
ADDRESSS SCHOOL

Frank Sontag
FATHER
Same
ADDRESS
825-6589
PHONE
Thomas Pub Co
EMPLOYED
Christina Sontag
MOTHER
Family Planning Services of Erie Other
EMPLOYED **Jon 1yr**

Kathryn
VICTIM

OFFENSE DATE
**3/7/87**
**Time 1200 &1700**

Goodman, D, OFFICER DATE 3/25/87

DISPOSITION OF CASE –**RAPE CRISIS CENTER**

---

**Department of Police – MILLCREEK TOWNSHIP**

**CRIMINAL REPORT**

CASE NUMBER **87-565-10**

COMPLAINT NUMBER **949 (Z!)**

OFFENSE - **INDECENT ASSAULT**
VICTIM – **KATHYN S. BOYD (SONTAG)**
ADDRESS- **713 E. GRANDVIEW**
PHONE- **825-6589**
SEX- **F** AGE – **5** **AM/CAUC**
**FRANK AND CHRIS SONTAG (MOTHER AND FATHER)**
ATTACK INFO- **PANTS TAKEN OFF, AND BARD SKINNED CONTACT**
MOTIVE – **SEXUAL GRATIFICATION**
DATE **3/18/87**

DATE AND TIME OF OCCURRENCE
**Bet. 1200 and 1700 hrs.**

DETAILS:

On today's date at approximately 1600 hrs. several neighborhood children ranging in ages six to ten years old came to the SONTAG residence and informed MR. SONTAG of an indecent which took place over one week ago involying his five year old stepdaughter KATHRYN. They st that KATHRYN had her pants off in the woods with four other boys and were humping each other. They stated KATHRYN was force into taking her pants off pants off by one of the boys of which threaten her with a knife and also pushed her. The humping consisted of one on top of the other a grinding motion but no apparent penetration taking place. When KATHRYN came home from school on today's date with her mother, she was questioned and interviewed by this officer along her mother. KATHRYN confirmed the story and the fact that she was humping with her pants with four boys. These four boys are ages as followed: ERIC MARSHALL, age 9, of 805 E. Grandview Apt. 202; NICKY MARSHALL, age 8, of 805 E. Grandview Apt. 202: MIKE DORNOFIO (spelling) , age 10, of 803 E. Grandview Apt. 304; and possibly TRREVOR GOODSELL of 9xx E. Grandview, age 6, was involved in this incident.

Victim's parents will be notifying Rape Crisis Center 3/19/87 and investigation will continue by Cpl. Goodman of the juvenile division.

Investigating Officers: Ptlm. Leehner
Date/Time 3/18.87 Report Typed by 3/19/87
A. Flicking

ADDITIONAL DETAILS:

On 3/23/87.....The differences arise in the aspect that KATHRYN was threatened with a knife. I now know there was no knife arxxx the fact of the threat is becoming more fague.....I explained to them that because of their young ages I was referring them to the Rape Crisis Center and gave3 them the appropriate information so that they could contact the center. All agreed to do so except for MRS. GOODSELL. She said that she and her husband do not feel that it is necessary at this time. MRS. GOODSELL told me that she on one occasion found KATHRYN and he young daughter, who is about 2 ½, in the closet with their pants pulled down..... The Rape Crisis counselors psychologists should be able to ascertain if *the boys* need further counseling through the Child x Offenders Program. There are a large amount of older boys, pre-teens and teenages in the Apartment complex and if MIKE, ERICH and NICHOLAS heard them talking about humping and so rth there is a good possibility they decided to try this with KATHRYN who does have a habit pulling her pants down when she plays with her friends.....all the children having been talked to and their parents referred to Rape Crisis, this incident will be closed.

**APPENDIX SUB (D)**

**Erie County Rape Crisis Center, Inc.**

November 19, 2001

Frank Joseph Sontag
CZ5842
SCI Albion
10745 Route 18
Albion, PA 16475-0002

Dear Mr. Sontag:

Regarding your letter of November 5, 2001:

**The counselor's name was Kathy Peterson.** Ms. Peterson resigned from the agency in about March of 1988.

The case file was shredded as per agency policy described to you in my letter April 11. 2000.

Sincerely,
S/ Susanne M Porowski
Susanne M. Porowski
Executive Director

**(Reference letter of Nov 4th, 2001 follows :)**

Frank Joseph Sontag
CZ5842
10745 Route 18
Albion, PA 16475-0002

November 5th, 2001

To: **Erie County Rape Crisis Center, Inc**
Attn: Legal Department
125 West Eighteen Street
Erie PA 16501

To whom it may Concern:

In the first quarter of 2000 your organization was served with a subpoena to produce documents. In a response letter, from Susanne M. Porowski, dated April 11, 2000 she stated "It is policy of this agency to maintain client records for a period of five (5) years, after which they are shredded".

I am presently putting together a lawsuit and/or filing of a criminal conspiracy complaint that may involve you a en agency!

Understanding that you may be under policy to destroy client records, you cannot be under policy to destroy the records of who did the sexual counseling on Kathryn S. Boyd, my step daughter at the time and what action you took; this is In reference, to the previously submitted Criminal Report from Department of Police-Millcreek Township, Case, Number 87-565-10; concerning Kathryn Boyd, 713 E. Grandview, Erie, PA 16504. If all your records were destroyed, then you will need to verify in writing, if you were acting under the color of state law and why you

believe that you were not acting a state or a government agency enforcing a sexually discriminating policy or an unconstitutional equal protection policy.
If you cannot supply the name(s) of the sexual counselor(s) and what action was taken; then you can assume that a Conspiracy to Defraud the United States may be filed against you, under 18 U.S.A. § 371 Note 64, which involves the impairing, obstruction or defeating of lawful functions. Or you can assume, that this is also official notice under Federal Rule 27; and if you exercise a privilege yourself or one concerning Kathryn S. Boyd, then I inform you now that: "A privilege only bars discovery of the contents of the communication or information reflecting the contents; it **does not bar** the fact of communication, or protect a fact from discovery by its having been revealed to another in a privileged setting".

This action relates to a continuing conspiracy to defraud the U.S., a conspiracy to interfere with civil rights, deprivation of rights under color of law, and/or a conspiracy against rights. It would be wise to supply this information so that criminality and/or liability can be directed to the individuals that were responsible.

It has come to my attention, through the U.S. Department of Justice, that you were to pass all this information to the Erie County and Youth Service Agency - was this done?

If any copy costs are incurred for this information, please send me an estimated cost for this information and a payment arrangement will be worked on.

Thank You, for your attention to this matter and I'm looking forward to your response!

Sincerely,
s/ Frank Joseph Sontag

Frank Joseph Sontag

c:file

# MAIN APPENDIX (D)

0.1

IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF
PENNSYLVANIA

RECEIVED SEP 29 2000
CLERK U.S. DISTRICT COURT WEST, DIST.
OF PENNSYLVANIA

**FRANK J. SONTAG**
Petitioner

CA 97-349-ERIE
District Judge McLaughlin
Magistrate Judge Baxter

Vs.

NEAL MECHLING
Respondent

**MOTION FOR EXECUTION AND CLARITY**

**NOW COMES,** Frank Joseph Sontag, the petitioner asking for clarity and execution of separate order by the Honorable Judge Susan Baxter dated August 19th, 1999; granting Petitioner's Motion for Judgment on the Proceedings/Pleadings, for the following reasons:

1. Request for certificate of appealability was denied by the US Court of Appeals For the Third Circuit dated August 23, 2000. (With no opinion)

2. Request for a rehearing was denied September 21. 2000. (with no opinion). Thus, jurisdiction falls back to original order.

3. In the Magistrate Judge's Report and Recommendation, dated August 19th, 1999 on page 2, line 16-18 it states:

> "As a result of the motion in limine evidence of an alleged sexual assault of against the child victim by a group of young boys ( and subsequent rape counseling) was excluded.,!

This is an obvious lie to the court about what was suppressed here. The evidence in question; the Millcreek Police Report of the alleged sexual assault was riot suppressed in a motion of limine or any evidentiary hearing in any state court; this must be corrected. The Assistant DA, Mr. Piccinini has suppressed this evidence with total malfeasance before trial court proceedings and now before this court. (See **Crivens v. Roth,** 172 F.3d 991 (7th Cir 1999). Had the Assistant District Attorney given up the Millcreek Police Report concerning sexual assault to my counsel for defense, Petitioner would not have plead no contest/nolo contendere and insisted on going to trial. This Millcreek Police Report is material and favorable to the defense because only one witness told the story, her credibility becomes a critical component in her testimony: proving her lying, false reporting, a similar unfounded story is told again, and what sexual counseling could have caused her problems

later in life; all to the good of defense. The case is based entirely on credibility because it is one person word vs. another. Thus, it is favorable and material and would have seriously affected the outcome of the proceedings. Due process requires the prosecution to disclose to the defense all material exculpatory information in the state's possession, **Brady v, Maryland,** 373 U.S. 83; 87, 83 S.Ct. 1 94, 10 L Ed.2d 215 (1963), including impeachment evidence. **Giglio v. United States, 405, U.S.** 150, 92 S.Ct 763, 31 L-Ed-2d 104 (1972). Petitioner has shown cause for default and actual prejudice by the prosecution and failure to resolve this suppression issue would result in a fundamental miscarriage of justice. See **Coleman v. Thompson,** 501 U.S 750, Ill S.Ct 2546, 115 L.Ed.2d 640 (1991). And before all else. it should be clear that no post-conviction trial's court's finding (nor the Assistant District Attorney) that the evidence was really suppressed in any Motion of Limine or evidentiary hearing because these are not historical facts, but rather mixed conclusion of law and fact as to which the habeas court may make de nova finding which requires a evidentiary hearing and/or why this court granted the Petitioner's Motion for Summary Judgment. See **Miller v. Fenton,** 474 U.S. 104, 113-14, S. Ct. 445, 88 L Ed.2d 405 (1985), The prosecutor seems to be like the wolf is in charge of the hen house and if the wolf says there is no Brady violation then there is none? But the Millcreek Police

Report of a sexual assault (and subsequent rape counseling) was never suppressed in a Motion of Limine or any evidentiary hearing Yes, it is material! What knife? False Reporting? Why the same story? Kathryn, born February 3, 1982, was five years olds when she reported this crime and received said counseling which she has denied under oath, not age seven as reported, and says that she was embarrassed? Big words and feelings for a five year old! Seven years later she tells the same story and the state of Pennsylvania says no other evidence is needed to convict! Then when you do find impeachable evidence it is **illegally** hidden by state procedures, my due process rights are taken away by the state, and I am not entitled to a fair trial or Federal Habeas Relief? (See **United States v. Agues,** 427 U.S 97, 103.1 96 S.Ct 2392, 49 L Ed 2d 342 (1976) This is a serious Brady violation because the evidence was **not excluded** in any evidentiary ruling by any court. And as this court has noted: "The Commonwealth has failed to provide this Court with the documents relating to this evidentiary bearing." See page 28, footnote 10 of your Report and Recommendation. Thus, the Millcreek Police Report is material to guilt and punishment is favorable to this Petitioner and critical to the defense since it was her word alone that was "the evidence against me". Even a man of treason whom can harm millions, requires more than one person's testimony to convict, what is wrong with this picture in the state courts? There is no other material evidence in this case, there is only a story of a similar sexual assault which is told or) another person years

later and the first story was declared unfounded because their were four boys saying something else; the second story would work better because there was only one person denying it arid no other evidence was needed In addition the DA would also suppress any favorable material evidence because of the political winds.

4 While appealing to the 3rd Cir, my exhaustion of ineffective assistance of counsel was completed. I submitted three sworn affidavits (See Exhibit A"), to the 3rd Circuit Court; saying my attorney, Mr Dave Ridge promised me no state time for a no contest plea, proving ineffectiveness arid making the plea unkowningly and unintelligent. See **Hill v. Lockhart,** 474 U.S. 52, 88 L-Ed.2d 203, 106 S.Ct 366 (1985); **Machibroda v. United States,** 368 U.S. 487, 7 L.Ed 2d 473, 82 S.Ct. 510) **United States v. Scott,** 625 F 2d 623 (5th Cir 98); **Commonwealth v. Cofield,** 456 A.2d 650 (Pa. Super 1983); **Lynce v. Mathis,** 107 L,Ed.2d 63 (1997). This is a breach of a contract with the Commonwealth, a violation of my due process rights and involves violations of the first, fifth, sixth and fourtheenth amendment rights. As can be seen in Exhibit "B the Superior Court cannot even read an appeal by appointed counsel when Mr, Hathaway appointed counsel writes: "Whether the lower court erred in denying the Collateral Relief which sought to challenge the validity of his guilty pleas? Then as can seen in the order by the Superior Court page 2, they write: "Appellant raises one issue on appeal: whether the PCRA Court erred in dismissing

where trial counsel was ineffective for failing to file a motion to withdrawn his plea of nolo contendere". This due process violation is a total miscarriage of justice as the docket sheet shows at 2/23/96: "Post-Sentencing Motion Filed/Motion to Withdraw no contest plea filed By 12 Ridge". My counsel argues validity of guilty pleas being knowingly and intelligently made because of promises (no state time) made would testify to this fact. The affidavits prove this. The Superior Court further argues on page 3 that: In order to eligible for PCRA relief the petitioner must plead and prove by a preponderance of the evidence, not only an unlawfully induced plea but also that the petitioner is, in fact, innocent. Appellant has riot asserted his innocence in either, his original pro se petition or in his amended, counseled petition. He is therefore not eligible for PCRA relief." This malfeasance is appalling when in fact Dave Ridge **did file** my motion to withdraw my nolo contendere plea and that motion contained all necessary claims of innocence. This violates most cannon ethic codes! The attached affidavits prove constitutional violations in any state and especially federal courts. I also told Dave Ridge that Kathryn was sexually abuse at five years old and had sexual counseling for that event, if Petitioner finally got the Millcreek Police Report in a subpoena from federal court, just why couldn't he find it or at the very least explore the possibility? See **Woodard v. Collins,** 898 F.2d 1027 (5th Cir. 1-990). In addition, if Petitioner 's counsel had the Millcreek Police Report I would have

never taken the plea and would have gone to trail. These arguments follow the case law in: **Tate v. Wood** 963 F 2d 20 (2nd Cir 1992). **Spicer v. Warden of Rosbury Correctional institute,** 31 F. Supp.2d 509 D.Md. 1998); **Ostrander v. Green, 46** F.3d 347 (4th Cir 1995) **U.S. v. Mejian Mesa,** 153 F,3d 925 (9th Cir 1998); **Cheung v. Maddock,** 32 F.Supp.2d 1150 (N. D. Cal. 1998).

## CONCLUSION

**This Petitioner,** Frank Joseph Sontag, seeks execution of separate order dated August 9th, 1999 granting Petitioner 's Motion for Judgement on the Proceedings/Pleadings. This petitioner also requests a decision on ineffective assistance of counsel, in the interest, of speedy justice. For clarity, must I refile a PCRA again, to argue that my attorney told me that "In these types of crimes you are guilty unless you prove yourself innocent and Kathryn's testimony alone can get you 35 years." Another issue is about maximizing my state time? My attorney said I would be out in three years and yet Petitioner is doing the entire six years because of a DOC policy which makes the Petitioner, in a ex post facto way, a sexual violate predator without a hearing and requires admitting guilt in nolo contendere pleas which further violates my constitutional rights?. The Petitioner submitted these constitutional violations to Judge DiSantis which be himself declared unconstitutional and Exhibit "C" shows his ORDER Petitioner has been too abused to file anymore appeals in this state. I would pray you

can resolve these serious miscarriage of justice. In another interest of clarification, should Petitioner assume that if the other issues are not revolved by this court, then-all issues must be filed in U.S. Supreme Court in 90 days?

Respectfully Submitted,
s/Frank Joseph Sontag

Frank Joseph Sontag

**(HAND WRITTEN OPINION BY JUDGE BAXTER.....on last page of my Motion)**

FILED
2000 OCT 25 P2:04
CLERK
U.S. DISTRICT COURT

Motion for Execution is denied; Motion for Clarity is granted. The Petitioner's Motion for Judgment on the Pleadings, despite the title, was a motion for a decision on the habeas petition. It was granted because a decision was made by the Court, albeit against Petitioner. No execution may be made on the order. This case is closed.

AND NOW, this 25th

day of October , 2000

IT IS SO ORDERED.

s/Susan Paradise Baxter

UNITED STATES MAGISTRATE JUDGE

# MAIN APPENDIX (E)

CLERK OF RECORDS

**COMMONWEALTH OF PENNSYLVANIA**
**COURT OF COMMON PLEAS**
**COUNTY, PENNSYLVANIA**

**VS.**

**CRIMINAL DIVISION**

**FRANK J. SONTAG** NO. 1339 OF 1995
E **164416-0**

## INFORMATION

The District Attorney of Erie County, by this information, charges that on (or about) June, 1986 through October, 1988, in the said County of Erie and State of Pennsylvania, the said FRANK J. SONTAG, in a continuous course of conduct, did have indecent contact with another not his spouse, or caused such other to have indecent contact with him and he is over 18 years of age and the other person is under 14 years of age, to-wit: A FEMALE CHILD VICTIM, date of birth February 1, 1982, not his spouse, in that the said FRANK J. SONTAG, date of birth April 1, 1948, did have said FEMALE CHILD VICTIM masturbate him by having said FEMALE CHILD VICTIM manipulate his penis with her hands, occurring at 713 East Grandview Boulevard, Millcreek Township, Erie County, Pennsylvania; thereby, the said. FRANK J. SONTAG did commit the crime of INDECENT ASSAULT, a misdemeanor of the first -degree.

**COUNT TWO:**

**AND THE DISTRICT ATTORNEY FURTHER CHARGES** that on (or about)\ October, 1988 through October, 1992, in the said County of Erie and State of Pennsylvania, the said FRANK J. SONTAG, in a continuous course I of conduct, did have indecent contact with another not his spouse, or caused such other to have- indecent contact with him and he is over 18 years of age and the other person is under 14 years of age, to-wit: A FEMALE CHILD VICTIM, date of birth February 1, 1982, not his spouse, in that the said FRANK J. SONTAG, -late of birth April 1, 1948, did have said FEMALE CHILD VICTIM masturbate him _y having said FEMALE CHILD VICTIM manipulate his penis with her hands, occurring at 2953 Coleridge Drive, Millcreek Township, Erie County, Pennsylvania; thereby, the said FRANK J. SONTAG did commit the crime of INDECENT ASSAULT, a misdemeanor of the first degree.
ATTACHMENT "A"



**COUNT THREE:**

**AND THE DISTRICT ATTORNEY FURTHER CHARGES** that on (or about) June, 1986 through October, 1992, in the said County of Erie and State of Pennsylvania, the said FRANK J. SONTAG did threaten to commit any crime of violence with intent to terrorize another or to cause evacuation of a building,

place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience, to-wit: the said FRANK J. SONTAG did threaten to commit the violent crime of Murder with the intent to terrorize A FEMALE CHILD VICTIM, date of birth February 1, 1982, in that he -lid threaten to kill the said FEMALE CHILD VICTIM'S mother if said FEMALE "HILD VICTIM told anyone about his indecent assault upon her, occurring at

713 East Grandview Boulevard and/or 2953 Coleridge Drive, Millcreek Township, Erie County, Pennsylvania; thereby, the said FRANK J. SONTAG did commit the crime of TERRORISTIC THREATS, a misdemeanor of the first degree.

**COUNT FOUR:**

**AND THE DISTRICT ATTORNEY FURTHER CHARGES** that on (or about) June, 1986 through October, 1988; in the said County of Erie and State of Pennsylvania, the said FRANK J. SONTAG,' being of the age of 18 years or upwards, by any act did corrupt or tend to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, to-wit:

A FEMALE CHILD VICTIM, date of birth February 1, 1982, not his spouse, in that the said FRANK J. SONTAG, date of birth April 1, 1948, did have said FEMALE CHILD VICTIM masturbate him by having said FEMALE CHILD VICTIM manipulate his penis with her hands, and/or did request said FEMALE CHILD VICTIM to perform oral sexual intercourse upon him, and/or did have said FEMALE CHILD VICTIM view pornographic movies, occurring at 713 East Grandview Boulevard, Millcreek Township, Erie County, Pennsylvania; thereby, the said FRANK J. SONTAG did commit the crime of CORRUPTION OF MINORS, a misdemeanor of the first degree.



COUNT FIVE:

AND THE DISTRICT ATTORNEY FURTHER CHARGES that on (or about) October, 1988 through October, 1992, in the said County of Erie and State of Pennsylvania, the said FRANK J. SONTAG, being of the age of 18 year

upwards, by any act did corrupt or tend to corrupt the morals of any minor less than 18 years of age, or who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or

encourages such minor in violating his or her parole or any order of court, to-wit:

A FEMALE CHILD VICTIM, date of birth February 1, 1982, not his spouse, in that the said FRANK J. SONTAG, date of birth April 1, 1948, did have said FEMALE CHILD VICTIM masturbate him by having said FEMALE CHILD VICTIM manipulate his penis with her hands, and/or did. request., said FEMALE CHILD VICTIM to perform oral sexual intercourse upon him,. and/or did have said FEMALE CHILD VICTIM view pornographic movies, occurr-ing at 2953 Coleridge Drive, Millcreek Township, Erie' County, Penn Pennsylvania Ivan thereby, the said FRANK J. SONTAG did commit the. crime of CORRUPTION OF MINORS,- a: misdemeanor of- the. first degree.

COUNT SIX:

**AND THE DISTRICT ATTORNEY FURTHER CHARGES** that on (or about) Julie,

1996 through October, 1988, in the said county of Erie. and State of' Pennsylvania, the said FRANK J. SONTAG, ci's being parent, guardian, or other person supervising the welfare of a child under 18 years of age, did knowingly endanger the welfare of the child by violating a duty of care, protection or support, to-wit: A FEMALE CHILD VICTIM, date of birth

February 1, 1982, not his spouse, in that the said FRANK J. SONTAG, being the stepfather of said victim, did have said FEMALE CHILD

VICTIM masturbate him by having said FEMALE CHILD VICTIM manipulate his penis with her hands, and/or did request said FEMALE CHILD VICTIM to perform oral sexual intercourse upon him, and/or did have said FEMALE CHILD VICTIM view pornographic movies, occurring at 713 East Grandview Boulevard, Millcreek Township, Erie County, Pennsylvania; thereby, the said. FRANK J. SONTAG did commit the crime of ENDANGERING WELFARE OF CHILDREN, a misdemeanor of the first degree.

**Commonwealth v. FRANK J. SONTAG**
**Docket No. 1339 of 1995; E 164416-0**
**Information**
**Page 4**

**COUNT SEVEN:**

**AND THE DISTRICT ATTORNEY FURTHER CHARGES** that on (or about) October, 1988 through October, 1992, in the said County of Erie and State of Pennsylvania, the said FRANK J. SONTAG, as being parent, guardian, or Other person supervising the welfare of a child under 18 years of age, did knowingly endanger the welfare of the child by violating a duty of Are, protection or support, to-wit: A FEMALE CHILD VICTIM, date of birth

February 1, 1982, not his spouse, in that the said FRANK J. SONTAG, being the stepfather of said victim, did have said FEMALE CHILD VICTIM masturbate him by having said FEMALE CHILD VICTIM manipulate his penis with her hands, and/or did request said

FEMALE CHILD VICTIM to perform oral sexual intercourse upon him, and/or did have said FEMALE CHILD VICTIM view pornographic movies, occurring at 2953 Coleridge Drive, Millcreek Township, Erie County, Pennsylvania; thereby, the said FRANK J. SONTAG did commit the crime of ENDANGERING WELFARE OF CHILDREN, a misdemeanor of the first degree.

All of which is against the Act of Assembly and the peace and dignity of the Commonwealth of Pennsylvania.

Notice is hereby given, per Pa.R.Crim.P. 1127(B) (1) that this information will be tried with Information_____
(XX Notice is hereby given, per Pa.R.Crim.P. 1127(B)(1), that your case will be tried together with all co-defendant(s) since you are alleged to have participated in the same act or transaction.
**18 P.S. 3126(a)( 6)[two counts]**
**18 P.S. 2706**
**18 P.S. 6301 [two counts]**
**18 P.S. 4304 [two counts]**
Citation of Statute & Section

s/__xxxxxxxxxx_____

Attorney For Commonwealth

# MAIN APPENDIX (F)

Erie County Clerk of Courts Page
13533612151997 Case Print
1995 - 01339 SONTAG FRANK J

GENERAL INFORMATION

Clerk s Filing Date.....5/26/1995
And Time .....9:00
Case Type/Action .....1 1 CRIMINAL
Docket No. Fin Auth....- 0000000
OTN .....E1644160
.Final Issuing Auth ....15 MANZI PAUL
ID# 06202
Municipality Code 33 MILLCREEK
TOWNSHIP
Social Security No ... 186-40-5530
Primary Address I .... 2953 COLERIDGE DR
Address 2 ....
City, State, Zipcode. ERIE, PA 16506
Alternate Address 1..
Address 2.. City, State, Zipcode.
Date of Birth .....5/01/1948
Sex .....M
(M=Male/F=Female/U=Unknown)
Race .....U
UNKNOWN/UNREPORTED
Operator License No.
Affiant 1 .....T CARLOTTI
Affiant 2
Date of Arrest ..... 0/00/0000
Mag. Complaint Filed. 0/00/0000
Prelim. Arriqn. Date. 0/00/0000
Date Waived to Court. 0/00/0000
Prelim. Hearing Date. 0/00/0000
District Attorney
Defndt Atty/Type I ...364 RIDGE DAVID G,
ESQ .....ID# 44638

Defndt Atty/Type 2
Date Bail Set .....4/21/1995
Bail Code Desc ..... ROR
Surety
Bail Set Amount .....10,000.00
Committed Date .....0/00/0000
In Jai'l / Fugitive N (Y=In Jail/ N=Not In Jail/ F=Fugitive)
State Id Number .....0000000000
Auto Registration .....
Public Comments
Reference Number .....CR120-95/MANZI
Court Stenographer
FBI Id Number
Height ..... .....Weight ..... A
Hair Color Eye Color .....
Office Comments .....

CCS600 Erie County Clerk of Courts Page
13533612151997 Case Print
1995 - 01339 SONTAG FRANK J
Init. Issuing Auth 00000
Docket No. Init Auth. - 0000000
Pre-Sentence Invest.
Trial Commenced Date.
Trial Judge
Sentence/ARD Date
Effect. Date of Snt 0/00/0000
Superior Court #

| Filed/Reopened | Description | Disposition | Disposition Code |
|---|---|---|---|
| 5/26/1995 | INITIAL FILING | | |
| | 0/00/0000 | x | |

ALIAS OR CO-DEFENDANT INFORMATION
Alias or Co-Defendant Name Type
CHARGE INFORMATION
Date Chrg Cnt Section Sub Grd Desc

6/01/86 001 CC3126 MI
Disposition Date .....0/00/0000
Disposition Description. PLED NO CONTEST
6/01/86 002 CC3126 MI
Disposition Date .....0/00/0000
Disposition Description. PLED NO CONTEST
6/01/86 003 CC2706
M1TERRORISTIC
THREATS
Disposition Date .....0/00/0000
Disposition Description. PLED No CONTEST
6/01/86 004 CC6301
MICORRUPTION OF
MINORS
Disposition Date .....0/00/0000
Disposition Description. PLED NO CONTEST
6/01/86 005 CC6301
MICORRUPTION OF
MINORS
Disposition Date .....0/00/0000
Disposition Description. PLED NO CONTEST
6/01/86 006 CC4304
MI
ENDANGERING
WELFARE OF CHILDREN
Disposition Date .....0/00/0000
Dispostition Description. PLED NO CONTEST
6/01/86 007 CC4304
MI
ENDANGERING
WELFARE OF CHILDREN
Disposition Date .....0/00/0000

Disposition Description. PLED NO CONTEST
DOCKET ENTRY INFORMATION
Case Type..: CRIMINAL Case
Action..: COMPLAINT

- - - - - - - - - - - - - - - FIRST ENTRY

3/07/95 ORDER FOR RECORDS FROM HAMOT MEDICAL CENTER SHAD CONNELLY, JUDGE

CCS600 Erie County Clerk
of Courts Page
13533612151997 Case Print
1995 - 01339 SONTAG FRANK J----------
6/22/95 WAIVER OF ARRAIGNMENT FILED
6/26/95 INFORMATION
FILED----------7/11/95
RULE TO SHOW CAUSE: RULE RETURNABLE
8/7/95 @ 3:OOPM.
S/S DOMITROVICH JUDGE
7/12/95 MOTION TO COMPEL DISCOVERY RECORDS 0 THE OFFICE OF CHILDREN AND YOUTH SERVICES. D. RIDGE ESQ.
**8/08/95 ORDER MOTION TO COMPEL DISCOVERY, IT IS ORDERED THAT SAID MOTION IS HEREBY DENIED WITHOUT PREDUDICE TO DEFENDANT, AS THE COMMONWEALTH HAS COMPLIED WITH ALL DISCOVERY REQUESTS TO DATE. S/S DOMITROVICH JUDGE**
10/30/95 APPLICATION FOR CONTINUANCE WITH WAIVER OF PROMPT OR SPEEDY TRIAL FILED SHOWING THE FOLLOWING ORDER: THIS 30TH DAY OF OCTOBER,1995, ALL PENDING CHARGES AGAINST DEFENDANT ARE CONTINUED TO THE NEXT

TWO-MONTH TERM OF COURT. S/R M FISHCER, JUDGE
2/07/96 DEFENDANT APPEARS IN COURT WITH HIS COUNSEL
APPEARANCE FILED BY D RIDGE, ESQ
2/07/96 WAIVER OF THE PRESENCE OF JUDGE AND/OR COURT REPORTER DURING EXAMINATION AND CHALLENGES OF TRIAL JURORS FILED SHOWING CONSENT IS GRANTED FOR WAIVER OF THE PRESENCE OF JUDGE AND COURT REPORTER DURING JURY SELECTION SIGNED AND FILED BY DEFENDANT AND JUDGE DISANTIS
2/07/96 CASE CALLED WITH THE HONORABLE JUDGE DISANTIS ON THE BENCH THE DEFENDANT HAVING BEEN ARRAIGNED PLEADS NOT GUILTY
2/08/96 THE JURY-IS DISMISSED AND A PLEA IS ENTERED
2/08/96 DEFENDANT APPEARS IN COURT WITH HIS COUNSEL BEFORE JUDGE DISANTIS APPEARANCE FILED BY D RIDGE,ESQ DEFENDANT'S STATEMENT OF RIGHTS SIGNED AND FILED
DEFENDANT PLEADS NO CONTEST AS CHARGED
SENTENCE DEFERRED TO 3/11/96 AT 9:OOAM/DOMITROVICH/ROR BOND NO CONTACT WITH VICTIM
2/23/96 POST-SENTENCING MOTION FILED/MOTION TO WITHDRAW NO CONTEST PLEA FILED BY D RIGDE, ESQ. SHOWING RULE TO SHOW CAUSE: RETURNABLE 3/4/96 @ 1:30 P M. S/E J DISANTIS, JR., JUDGE
3/01/96 TRANSCRIPT OF PROCEEDINGS PLEA ON FEBRUARY 8, 1996 BEFORE THE

HONORABLE ERNEST J DISANTIS FILED BY COURT REPORTER SYLVIA M WAID
3/06/96 ANSWER TO POST-SENTENCING MOTION FILED/ OPINION & ORDER DATED 3/6/96 SHOWING THE FOLLOWING: DEFENDANT'S MOTION TO WITHDRAW NO CONTEST PLEA IS DENIED. S/ERNEST J DISANTIS, JR., JUDGE

3/07/96 PETITION FOR RECONSIDERATION OF OPINION AND ORDER DATED MARCH 6,96 FILED BY MIT. KELLEY ESQ
3/08/96 ORDER SENTENCING IN THE ABOVE CAPTIONED CASE IS CONTINUED FROM CCS600 Erie County Clerk of Courts
13533612151997 Case Print

1995 - 01339 SONTAG FRANK J

3/11/96 @ 9:OOAM TO 3/12/96 @ 9:OOAM. S/S DOMITROVICH JUDGE
3/08/96 ORDER DEFENDANT'S PETITION FOR RECONSIDERATION OF OPINION AND ORDER DATED 3//6/96, IT IS HEREBY ORDERED THAT THE DEFENDANT'S PETITION IS DENIED. S/E DISANTIS JUDGE
3/12/96 DEFENDANT'S ACKNOWLEDGMENT OF POST-SENTENCING RIGHTS SIGNED AND FILED. ERNEST DISANTIS, JR., JUDGE
3/12/96 SENTENCE CT-2;COSTS; 18 MOS TO 36 MOS SCI AT WESTERN TO BE SERVED FROM MARCH 12, 1996; 500 FINE CT.1;COSTS; 12 MOS To 24 MOS CONSECUTIVE & AGGREGATED TO COUNT 2

500 FINE CT.3;COSTS; 6 MOS TO 12 MOS CONSECUTIVE & AGGREGATED TO COUNT 1; 500 FINE CT.4;COSTS; 6 MOS TO 12 MOS CONCURRENT TO COUNT 3 CT.5;COSTS; 6 MOS TO 12 MOS CONCURRENT TO COUNT 4 CT.6;COSTS; 6 MOS TO 12 MOS CONCURRENT TO COUNT 5 CT.7;COSTS; 6 MOS TO 12 MOS CONCURRENT TO COUNT 6 RECOMMENDS ALBION

3/12/96 GUIDELINES FILED

3/12/96 ORDER COURT HEREBY TRANSFERS THE ABOVE CAPTIONED. CASE FOR PURPOSES OF SENTENCING TO THE HONORABLE E. DISANTIS. THE SENTENCING WILL BE HELD ON MARCH 12,1996 AT 9:OOAM. S/S DOMITROVICH JUDGE

3/19/96 PETITION FOR BOND PENDING APPEAL PURSUANT TO PA. RULE OF CRIMINAL P PROCEDURE 4010(B)FILED BY D. RIDGE ESQ AND M.H.KELLY ESQ.

3/19/96 RULE TO SHOW CAUSE RETURNABLE 3/28/96 @ 9:OOAM.S/E DISANTIS JUDGE

3/20/96 POST-SENTENCING MOTION FILED MOTION FOR RECONSIDERATION/MODIFICATION OF SENTENCE FILED BY D. RIDGE ESQ AND M.H. KELLEY ESQ

3/20/96 ORDER THIS COURT SCHEDULES ORAL ARGUMENT RELATIVE TO THE DEFENDANT MOTION FOR RECONSIDERATION/MODIFICATION OF

SENTENCE FOR 3/25/96 AT 9:OOAM. S/E DISANTIS JUDGE
3/28/96 ORDER AFTER CONSIDERING THE MOTION FOR RECONSIDERATION/MODIFICATION OF SENTENCE, AS WELL AS ARGUMENT RELATED TO THAT MOTION, IT IS HEREBY ORDERED THAT THIS COURT GRANTS RECONSIDERATION. BOTH THE DEFT'S COUNSEL AND THE COMMONWEALTH ARE TO SUBMIT TO THIS COURT WITHIN FOURTEEN (14) DAYS OF THE DATE OF THIS ORDER ANY WRITTEN MEMORANDA IN SUPPORT OF THEIR RESPECTIVE POSITIONS. THE DEFT'S SENTENCE OR IF THE INSTANT MOTION WOULD BE DENIED BY OPERATION OF LAW.S/E DISANTIS JUDGE
4/10/96 ORDER THIS 8TH DAY OF APRIL 1996, CONSIDERING THE DEFT'S PETITION FOR BOND PENDING APPEAL, THE COMMONWEALTH'S ORAL ARGUMENT IN OPPOSITION PRESENTED MARCH 28,1996 AND THE OTHER MATTERS OF RECORDS IT IS HEREBY ORDERED THAT THE DEFT'S PETITION IS DENIED DUE 0 THE FACT THAT DEFT. IS TO BE RESENTENCED. S/E DISANTIS JUDGE
3/10/96 ANSWER TO POST-SENTENCING MOTION FILED/ORDER DATED 4/10/96 DEFENDANT'S MOTION FOR RECONSIDERATION/MODIFICACATION OF, SENTENCE &

1995 - 01339 SONTAG FRANK J
SUPPLEMENTAL MOTION, IT IS ORDERED THAT THE DEFENDANT'S SENTENCE IS VACATED BECAUSE OF IMPROPER GRADING & SUBSEQUENT CALCULATION OF SENTENCING GUIDELINES RELATIVE TO CT 1. RESENTENCING IS SCHEDULED FOR 4/15/96 @ 9:00 A M. S/ERNEST J DISANTIS, JR., JUDGE
4/15/96 RE-SENTENCING
CT.2;COSTS; 18 MONTHS TO 36 MONTHS SCI AT WESTERN TO BE SERVED FROM MARCH 12, 1996. 500 FINE COSTS; 12 MONTHS TO 24 MONTHS TO BE SERVED CONSECUTIVE TO COUNT 2; 500 FINE CT.3;COSTS; 6 MONTHS TO 12 MONTHS CONSECUTIVE TO COUNT 1; 500 FINE
CT.4;COSTS; 6 MONTHS TO 12 MONTHS CONCURRENT TO COUNT 3
CT.5;COSTS; 6 MONTHS TO 12 MONTHS CONCURRENT TO COUNT 4
CT.6;COSTS; 6 MONTHS TO 12 MONTHS CONCURRENT TO COUNT 5
CT.7;COSTS; 6 MONTHS TO 12 MONTHS CONCURRENT TO COUNT 6
THIS SENTENCE IS AGGREGATED
RECOMMENDED ALBION
DISANTIS ERNEST J JR
4/15/96 GUIDELINES FILED
4/18/96 PETITION FOR BOND PENDING APPEAL PURSUANT TO PA. RULE OF CRIMINAL PROCEDURE 4010 (B) FILED BY M.H. KELLEY ESQ & D. RIDGE ESQ.

5/01/96 RULE TO SHOW CAUSE RETURNABLE 5/9/96 @ 3:30PM. S/E DISANTIS JUDGE
5/02/96 ORDER FOR TRANSPORT FROM WESTERN TO ERIE COUNTY FOR HEARING S/E DISANTIS JUDGE
5/10/96 ORDER/AND NOW, THIS 10TH DAY OF MAY 1996, AFTER HAVING CONSIDERED ALL MATTERS OF RECORD AS WELL AS ARGUMENT OF COUNSEL, IT IS HEREBY ORDERED THAT THE DEFENDANT'S PETITION FOR BOND PENDING APPEAL IS DENIED. S/ERNEST J DISANTIS, JR., JUDGE
5/13/96 NOTICE OF APPEAL (ORDER DATED APRIL 15, 1996)PROOF OF SERVICE AND $55.00 FILING FEE FILED BY DAVID G RIDGE ESQ
5/17/96 TRANSCRIPT OF PROCEEDINGS PETITION FOR BOND PENDING APPEAL ON MAY 9, 1996 BEFORE THE HONORABLE ERNES J DISANTIS FILED BY COURT REPORTER GREGORY SCHERF
5/20/96 ORDER - CONCISE STATEMENT TO BE FILED WITHIN 14 DAYS S/J/E.DISANTIS
5/24/96 CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL FILED BY D RIDGE, ESQ.AND M HAWK-KELLEY, ESQ
6/20/96 TRANSCRIPT OF PROCEEDINGS MOTION TO RECUSE SENTENCING ON MARCH 12 1996 BEFORE THE HONORABLE ERNEST J DISANTIS FILED BY COURT REPORTER CHERYL COOK CHADWICK
6/17/96 TRANSCRIPT OF PROCEEDINGS RESENTENCING ON APRIL 15, 1996 BEFORE THE HONORABLE ERNEST J DISANTIS FILED BY COURT REPORTER JEANNE M SYKES

6/24/96 TRANSCRIPT OF PROCEEDINGS MOTION TO WITHDRAW NO CONTEST 1. !PLEA ON MARCH 4, 1996 BEFORE THE HONORABLE ERNEST J DISANTIS FILED BY COURT REPORTER MONICA SAWKA



1995 - 01339 SONTAG FRANK J

6/26/96 MEMORANDUM OPINION SIGNED AND FILED JUDGE DI SANTIS
6/24/96 SUPPLEMENTAL MEMORANDUM OPINION SIGNED AND' FILED JUDGE DISANTIS
5/17/96 DOCKETED NOTICE OF APPEAL/SUPERIOR COURT # 876 PGH 96
6/26/96 ALL PAPERS SENT TO SUPERIOR COURT
5/02/97 PETITION FOR ALLOWANCE OF APPEAL TO SUPREME COURT NO 0267 WD ALLOCATUR DKT 1997. ORIGINAL RECORD TO BE RETAINED BY SUPERIOR
10/24/97 DISPOSITION FOR ALLOWANCE OF APPEAL DENIED 10-2-97 AND NOW, THIS 2ND DAY OF OCTOBER, 1997, THE PETITION FOR ALLOWANCE OF APPEAL IS DENIED. PC
11/03/97 ALL PAPERS RETURNED FROM. SUPERIOR COURT
11/03/97 ORDER OF SUPERIOR COURT IT IS NOW HERE ORDERED THAT THE JUDGMENT OF THE COURT OF COMMON PLEAS IS HEREBY AFFIRMED. BY THE

JRT ELEANOR R VALECKO DEPUTY
)THONOTART
ST ENTRY
)STS & FINES INFORMATION
e_Type..: CRIMINAL
e Action: COMPLAINT

| cription | Costs/Fines Pd To Date Amount Due | | In |
|---|---|---|---|
| row | Pymt | | |
| ANSCRIPTS | 63.45 | .00 | 63.45 |
| JRT FEE | 20.70 | .00 | 20.70 |
| ER FEE | 10.00 | .00 | 10.00 |
| ERKS FEE | 90.00 | .00 | 90.00 |
| JNTY FINES | 500.00 | .00 | 500-00 |
| JNTY FINES | 500.00 | .00 | 500.00 |
| JNTY FINES | 500.00 | .00 | 500.00 |
| ANSCRIPTS | 65.00 | .00 | 65.00 |
| ANSCRIPTS | 118.40 | .00 | 118.40 |
| ANSCRIPTS | 48.10 | .00 | 48_10 |
| ANSCRIPTS | 35.15 | .00 | 35.15 |
| F.E. ACT158 | 5.00 | .00 | 5.00 |
| TE COST | 7.43 | .00 | 7.43 |
| . 627 COST | 6.37 | .00 | 6.37 |
| COSTS | 15.00 | .00 | 15.00 |
| ME COMM COST | 15.00 | .00 | 15.00 |
| COSTS | 10.00 | .00 | 10.00 |
| FEE | 1.50 | .00 | 1.50 |
| NT SER SURG | 5.00 | .00 | |
| t/Fines Total | 2,016 . 10 | .00 | 2,016.10 |
| h Bonds Total | .00 | .00 | .00 |

of Listing --

## MAIN APPENDIX (G)

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**NO 99-3814**

**FRANK JOSEPH SONTAG,**
Appellant,

V.

**NEAL H. MECHLING, Superintendent**
Appellee.

**AFFIDAVIT AS TO WHAT WAS SAID TO FRANK JOSEPH SONTAG ON THE MORNING OF HIS TRIAL 13Y MR. DAVE RIDGE ESQ.**

I am Peter P. Repoff
Residing at 3920 Allegheny Rd.
Erie, PA 16509

2. On or about February 8th, 1996, the date the Appellant, Frank Joseph Sontag, was scheduled to trial. I was present and heard some of the conversations between Frank Joseph Sontag and his counsel David Ridge, Esq.

3. After careful thought, trying to remember all. the details, the jest of all that communi cations was : (concerning what Dave Ridge. told Frank Joseph Sontag and why he took the Plea, that morning) David Ridge, Esq. told the Appellant, Frank Joseph Sontag, he had two choices. He could go to trial and risk winning or loosing, or could take a Plea. If he wins the trial, he goes home and if he looses, he would

serve state time. If he took a Plea, state time could be avoided, but get some county time and possible work release because he had no prior record of any kind.

4. What did you think when Frank Joseph Sontag got state time on March 12, 1996, after what Dave Ridge told 'him?

I was surprised because this contradicted what David Ridge recommended.

5. I firmly believe, that the Appellant, Frank Joseph Sontag, believed the foregoing statements to be the jest of the communication between him and Mr. Dave Ridge.

Name: Peter P. Repoff
Address: 3920 Allegheny Rd.
City, Erie, PA 16509
s/ Peter P. Ropoff Date: April 24, 2000

Sworn to before me this
24 day of April, 2000.

s/ Jennifer K Grant

Notary Public

**NOTARIAL SEAL**
**JENNIFER K. GRANT, NOTARY PUBLIC**
**ERIE., ERIE COUNTY, PENNA.**
**MY COMMISSION EXPIRES NOV. 19, 2001**

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**NO. 99-3614**

**FRANK JOSEPH SONTAG,**
Appellant,

V.

**NEAL H. MECHLING, Superintendent**
Appellee.

**AFFIDAVIT AS TO WHAT WAS SAID TO FRANK JOSEPH SONTAG ON THE MORNING OF HIS TRIAL BY MR. DAVE RIDGE, ESQ.**

I. I am Frank L. Sontag, the Appellant's father, residing at 3908 Perry Street, Erie, PA 16504.

2. On or about February 8th, 1996, the date the Appellant, Frank Joseph Sontag, was scheduled to trial on numerous sex charges, I was present and heard some of the conversations between Frank Joseph Sontag and his counsel David.Ridge, Esq.

3. After careful thought, trying to remember all the details, the jest of all that communications was

> "That the Dave Ridge, Esq. bad told the Appellant, Frank Joseph Sontag, be had two choices: one, was to go to trial and risk winning or loosing; two, was to take a Plea. If we win, you go home, if we Jose you would certainly get state time. If

you take a Plea you will avoid state time, get some county time and possible work release, because you have no prior record of any kind."

4. On March 12, 1996; I was in total shock to 'heard that the Appellant, Frank Joseph Sontag, was getting state time.

5. I firmly believe, that the Appellant certainly believed the same thing; take the plea, end this, go to Texas, and avoid state time.

Frank L. Sontag
3908 Perry Street
Erie, Pa 16504

s/ Frank L Sontag Date 24 APR 2000

Sworn to before me this

24 day of April, 2000.
s/ Cheryl L. Kita

Notary Public

Notarial Seal
Cheryl L Kita, Notary Public
Erie, Erie County
My Commission Expires July 9, 2001

Member Pennsylvania Association of Notaries

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**NO. 99-3814**

**FRANK JOSEPH SONTAG,**
Appellant,

V.

**NEAL H. MECHLING, Superintendent**
Appellee.

**AFFIDAVIT AS TO MAT WAS SAID 70 FRANK JOSEPH SONTAG ON THE MORNING OF HIS TRIAL BY MR. DAVE RIME, ESQ.**

1. I am Florence Sontag, the Appellant's mother, residing at 3908 Perry Street, Erie, PA 16504.

2. On or about February 8th, 1996, the date the Appellant, Frank Joseph Sontag, was scheduled to trial on numerous sex charges, I was present and heard some of the conversations between Frank Joseph Sontag and his counsel David Ridge, Esq.

3. After careful thought, trying to remember all the details, the jest of all that communications was

> "That the Dave Ridge, Esq. had told the Appellant, Frank Joseph Sontag, he had two choices: one, was to go to trial and risk winning or loosing; two, was to take

a Plea. If we win, you go home, if we lose you would certainly get state time. If you take a Plea you will avoid state time, get some county time and possible work release, because you have no prior record of any kind."

4. On March 12, 1996, 1 was in total shock to beard that the Appellant, Frank Joseph Sontag, was getting state time.

5. 1 firmly believe, that the Appellant certainly believed the same thing; take the plea, end this, go to Texas, and avoid state time

Florence Sontag
3906 Perry Street
Erie, Pa 16504

s/ Florence Sontag Date: 24 APR 2000

Sworn to before me this

24 day of April , 2000.

s/ Cheryl L. Kita
Notary Public

**Notarial Seal**
**Cheryl L, Kita, Notary Public**
**Erie, Erie** County
**My Commission Expires July 9, 2001**

**Member, Pennsylvania Association of Notaries**